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No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN C. COOK, *et al.*,

and

F.J. LEWANDOWSKI, *et al.*,

Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC.; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; AIR LINE PILOTS ASSOCIATION, PAN AM CHAPTER; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, PAN AM CHAPTER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JEFFREY C. LONDA
HUTCHESON & GRUNDY
3300 Citicorp Center
1200 Smith Street
Houston, Texas 77002-4579
(713) 951-2812

ROBERT E. COHN
KEVIN F. FLYNN
SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8060
Counsel for Petitioners

JEFFREY BERNBACH
521 Fifth Avenue
New York, New York 10175
(212) 687-9730
Of Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

Did the lower courts err in holding, contrary to the Age Discrimination in Employment Act ("ADEA") and applicable regulations and case precedent, that the Pan Am pilot seniority system is as a matter of law entitled to exemption from the ADEA pursuant to Section 4(f)(2) of that statute, when (i) such system is not "bona fide" because it is based not on length of service but rather on the career expectations of younger, junior employees, and (ii) such system is a subterfuge to evade the ADEA's purposes because it was not implemented by Pan Am for legitimate business purposes, but rather with reckless disregard for the ADEA?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners John C. Cook, *et al.*, and F.J. Lewandowski, *et al.*, file this Petition for a Writ of Certiorari ("Petition") in the above-captioned action.

I. STATEMENT OF THE CASE

This Court should grant a writ of certiorari to review the decision issued on May 8, 1987, by the U.S. Court of Appeals for the Second Circuit in the above-captioned

case. Petitioners will discuss the procedural history and the basic facts involved in this case in this section of the Petition.

A. Procedural History

On March 7, 1984, 439 of the 773 Petitioners filed a Complaint in the U.S. District Court for the Southern District of New York, alleging that Respondents Pan American World Airways, Inc. ("Pan Am"), and the Air Line Pilots Association, International ("ALPA"), Air Line Pilots Association, Pan Am Chapter ("ALPA-PAA"), Flight Engineers International Association ("FEIA") and Flight Engineers International Association, Pan Am Chapter ("FEIA-PAA") (collectively "Unions") had violated, *inter alia*, the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 623-631 (1987), and New York Human Rights Law ("NYHRL"), N.Y. Exec. Law § 290, *et seq.* (1987), in implementing Pan Am's pilot seniority system. Petitioners are all over 40 years of age, are and/or have been employed as pilots and/or flight engineers by Respondent Pan Am, and are members and/or apprentice members of Respondent Unions.

On March 27, 1985, *Lewandowski, et al. v. Pan American World Airways, Inc., et al.*, 85 Civ. 2371, was filed, in which 153 additional Pan Am pilots/flight engineers raised legal and factual issues identical to those in *Cook*; that case has been consolidated with the *Cook* case, and 181 more Petitioners have legally "opted in" to the action since such consolidation.

On October 31, 1984, the District Court granted Respondents' motions for summary judgment and/or for dismissal of the complaint in *Cook* on procedural grounds. On August 22, 1985, the Second Circuit reversed that decision and remanded the *Cook* case to the District Court for consideration on the merits. *Cook v. Pan*

American World Airways, Inc., 771 F.2d 635 (2d Cir. 1985), *cert. denied*, 106 S.Ct. 895 (1986).

On June 27, 1986, Pan Am and the Unions filed motions for summary judgment seeking dismissal of *Cook* and *Lewandowski* on the grounds that the seniority system challenged by Petitioners is allegedly exempt as a matter of law from the ADEA. The District Court granted Respondents' motions by Opinion ("*Cook* Opinion") issued November 6, 1986. *See Cook v. Pan American World Airways, Inc.*, 647 F. Supp. 816 (S.D.N.Y. 1986), which appears at pp. 54a-74a in the Appendix which accompanies this Petition. On May 8, 1987, the Second Circuit affirmed the District Court's decision, adopting *in toto* and without elaboration the *Cook* Opinion issued by the District Court; the Second Circuit's order appears in the accompanying Appendix at 77a. Because they issued but one opinion in this case between them, the Second Circuit and District Court shall be referred to herein collectively as "the lower courts," unless otherwise noted, and the decision on appeal here as "the lower courts' decision."

B. Basic Facts

The following factual account is as set forth in the Appendix attached hereto, which has been extracted from the Joint Appendix ("JA") and deposition transcripts on file with the Clerk of the Court for the Second Circuit. In 1980, Pan Am merged with National Airlines, Inc. ("National"). Respondents ALPA and FEIA, through their respective chapters, represented Pan Am and National pilots and flight engineers. Respondent Unions submitted to an arbitrator, Mr. Lewis M. Gill, the issue of how the Pan Am and National pilot and flight engineer seniority lists were to be merged; the basis of this action is the *pilot*, not the flight engineer seniority sys-

tem.[1] Pan Am was not a party to such arbitration and expressly reserved the right to accept or reject the resulting arbitration award ("Gill Award" or "Award"). Pan Am representatives attended all of the Gill arbitration hearings. *Cook* Opinion, App. at 59a. As explicitly stated in the *Cook* Opinion, "Defendant Pan Am was aware that pre-merger Pan Am pilots as a group were older than pre-merger National pilots, and that any integrated seniority system which disadvantaged pre-merger Pan Am pilots would at the same time disadvantage older pilots." *Cook* Opinion, App. at 64a. The same can be said for Respondent Unions. This issue was discussed repeatedly during the Gill arbitration hearings which Pan Am representatives attended.

On March 12, 1981, Mr. Gill issued his Award. It created a seniority system comprised of two components: (1) an integrated list of all Pan Am and National pilots, and (2) provisions "conditioning and restricting" the straightforward allocation of employment benefits to pilots according to their sequence on the list.

First, the Gill Award incorporated a "ratio" method of integrating a substantial member of former National pilots into the Pan Am pilot seniority list, thereby disadvantaging hundreds of pre-merger Pan Am (*i.e.*, more senior and older) pilots. App. at 42a-43a. It is undisputed that, as the lower courts themselves even recognized, the ratio had the effect of *putting "National pilots with shorter length of service ahead of the earlier hired and generally older Pan Am pilots."* *Cook* Opinion, App. at 60a. Moreover, while the part of the final list actu-

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[1] The flight engineer system is not relevant to Petitioners' claims. While some of the Petitioners currently hold flight engineer positions, all of the Petitioners are part of the pilot system and it is inarguable that (i) pilot positions are generally more lucrative and prestigious than flight engineer positions, and (ii) *only* the pilot system determines the allocation of pilot positions to Pan Am airmen.

ally integrated by ratio constituted 49 percent of the total number of pilots employed by Pan Am and National as of the merger, the employment rights of pilots on no less than *61* percent of the merged pilot list were either directly or indirectly affected by the ratio. *See* Chart, App. at 80a. Obviously, the bottom part of the pilot seniority list cannot be said to have been integrated by length of service when hundreds of junior former National pilots who would, based on pure length of service, be below the more senior Pan Am pilots at that part of the list have instead been moved above them because of the ratio. Hence, it is most accurate to say that over 60 percent of the Pan Am pilot seniority list (*i.e.*, the 49 percent of the list "ratioed" plus the 12 percent of the list which is below the ratioed portion) is constructed in a manner which is anti-length of service. (Further information on how the ratio is anti-length of service can be found in the Appendix at pp. 24a-28a.)

Second, the "conditions and restrictions" imposed by the Gill Award on the operation of the integrated list also were designed to disadvantage hundreds of pre-merger Pan Am (*i.e.*, more senior and older) pilots. Those conditions and restrictions were originally proposed by the younger, more junior National pilots for the specific purpose of advancing their interests and subordinating those of the older, senior Pan Am pilots. App. at 42a-43a. The conditions and restrictions have been incorporated into the pilot system to the detriment of older employees. (Further information on how the conditions and restrictions are anti-length of service can be found in the Appendix at pp. 36a-39a and 43a.)

The Unions adopted and presented the Gill Award to Pan Am as a joint proposal. Pan Am adopted the Gill Award as its pilot and flight engineer seniority system on June 26, 1981, three and one-half months after it was

issued. *Cook* Opinion, App. at 64a.[2] With the acquiescence and support of the Unions, Pan Am has continued to implement the Gill Award to the detriment of older and more senior pilots.

II. REASONS THE WRIT SHOULD BE GRANTED

Under the applicable criteria set forth in Rule 17 of the Rules of the United States Supreme Court, a writ of certiorari should be granted in this case. The lower courts' decision purports to decide an important question of federal law which has not been, but should be, settled by this Court. Furthermore, the lower courts' decision is legally erroneous, and conflicts markedly with other applicable precedent on this issue and with the interpretation of the ADEA by the agency charged with its enforcement, *i.e.*, the U.S. Equal Employment Opportunity Commission ("EEOC").

The basic legal issues in this case are not complex. Petitioners have alleged on the basis of abundant and generally undisputed statistical and testimonial evidence that the Pan Am pilot seniority system has a severe adverse impact on pilots over the age of 40. As acknowledged by the lower courts, "the parties seem to assume that the system resulted in a discriminatory impact on older pilots." *Cook* Opinion, App. at 65a, fn. 3. Eight federal circuits have adopted the view, which no federal circuit has rejected, that an employment policy, such as the Pan Am pilot senority system, which has such an ad-

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[2] It is essential to note the irrelevance of the fact that the original proposal for structuring Pan Am's pilot seniority system was set forth by an arbitrator rather than by Pan Am or the Unions. It is absolutely unquestioned, and was conceded as such by the lower courts, that the arbitration proceeding in no way bound Pan Am. *Cook* Opinion, App. at 59a, 64a. Pan Am was free to accept or reject the Gill Award proposal, and did in fact accept it for its own operational reasons. This Court is to treat the Pan Am pilot seniority system as it would any other seniority system or employment policy.

verse impact violates the ADEA. *See, e.g., Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981). However, the lower courts in granting and upholding summary judgment in favor of Respondents in this case have erroneously decided that evidence which clearly demonstrates such an impact need not be submitted to the trier of fact, and that Pan Am's pilot system is deserving of exemption from the ADEA by virtue of Section 4(f)(2) of that statute.

Section 4(f)(2) is a very important part of the ADEA. It states:

> It shall not be unlawful for an employer, agency, or labor organization—
>
> . . . (2) to observe the terms of a *bona fide seniority system* or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, *which is not a subterfuge to evade the purposes of (the Act)* . . .

29 U.S.C. § 623(f) (1986) (emphasis added).

When an employer and/or union claims to be protected by Section 4(f)(2) from liability for any and all discriminatory effects of a seniority system, it assumes the burden of *proving* that the system conforms to the above standards. *See Paolillo v. Dresser Industries, Inc.*, 813 F.2d 583 (2d Cir. 1987); *EEOC v. Home Ins. Co.*, 672 F.2d 252, 260 (2d Cir. 1982). *See also Crosland v. Charlotte Eye, Ear & Throat Hospital*, 686 F.2d 208, 212 (4th Cir. 1982).

The lower courts have determined, and Petitioners agree, that the following EEOC regulation sets forth the proper definition of a "bona fide" seniority system under Section 4(f)(2) of the ADEA:

> Though a seniority system may be *qualified by such factors as merit, capacity or ability*, any bona fide seniority system *must be based on length of service as the primary criterion* for the equitable allocation

> of available employment opportunities and prerogatives among younger and older workers.

29 C.F.R. § 1625.8(b) (1987) (emphasis added). *See also Cook*, 771 F.2d at 644; *Cook* Opinion, App. at 66a. Thus, in order for a seniority system to be "bona fide" within the meaning of Section 4(f)(2), it must be proven that it is primarily based on length of service *and* that it is not qualified by factors unrelated to job competence or performance. The burden of proof in both respects is on Respondents. *Home Ins.*, 672 F.2d at 260; *Crosland*, 686 F.2d at 212.

Even if the system is proven to be "bona fide," in order for Respondents to prevail and obtain the Section 4(f)(2) exemption they must still prove that the system is not a "subterfuge" to evade the ADEA's purposes. The EEOC's regulation as to the "subterfuge" requirement provides in pertinent part:

> Adoption of a purported seniority system *which gives those with longer service lesser rights*, and results in discharge or *less favored treatment to those within the protection of the Act*, may, *depending upon the circumstances*, be a *subterfuge* to evade the purposes of the Act.

29 C.F.R. § 1625.8(b) (1987) (emphasis added). *See also Cook*, 771 F.2d at 644; *Cook* Opinion, App. at 67a-68a. Thus, to carry their burden of showing "no subterfuge," Respondents must prove that the seniority system in question does *not* adversely affect older employees *and* that it was adopted and implemented for legitimate, nondiscriminatory reasons. *Home Ins.*, 672 F.2d at 260. Respondents did not carry their burden of proof.

The importance of this case, and of the issues decided incorrectly by the lower courts, cannot be overemphasized. In even the narrowest sense, its impact is enormous: it will directly affect the employment rights of over two thousand Pan Am pilots, almost a thousand

of whom are Petitioners here whose careers will be destroyed if the lower courts' decision is allowed to stand. Even more important, however, are the interests of millions of employees over age 40 whose working lives are governed by seniority systems, and whose employment rights will be imperiled by the lower courts' unreasonably restrictive interpretation of Section 4(f)(2) of the ADEA—an interpretation which derives no support from the language nor the history of the statute or the applicable EEOC regulations. This Court should grant the requested writ, if for no other reason than to issue a definitive interpretation of the ADEA's Section 4(f)(2) exemption.

This Court should grant the writ of certiorari for the following reasons, which will be discussed separately in the remaining sections of this Petition:

1. The lower courts' holding the Pan Am's pilot seniority system is as a matter of law "bona fide" within the meaning of ADEA Section 4(f)(2) is legally erroneous, conflicts markedly with applicable precedent and EEOC interpretations on this issue, and purports to decide important questions of federal law which should be settled by this Court.

2. The lower courts' holding that Pan Am's pilot seniority system is as a matter of law "not a subterfuge to evade the purposes of the ADEA" within the meaning of Section 4(f)(2) is legally erroneous, conflicts with applicable precedent and EEOC interpretations on this issue, and purports to decide an important question of federal law which should be settled by this Court.

III. THE LOWER COURTS' HOLDING THAT PAN AM'S PILOT SENIORITY SYSTEM IS AS A MATTER OF LAW "BONA FIDE" WITHIN THE MEANING OF ADEA SECTION 4(f)(2) IS LEGALLY ERRONEOUS, CONFLICTS MARKEDLY WITH APPLICABLE PRECEDENT AND EEOC INTERPRETATIONS ON THIS ISSUE, AND PURPORTS TO DECIDE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

In holding that the Pan Am pilot seniority system is "bona fide" within the meaning of Section 4(f)(2) of the ADEA, the lower courts stated as follows:

> The integration . . . of two bona fide seniority lists in a way reasonably designed to preserve pre-merger expectations is itself a bona fide seniority system.

Cook Opinion, App. at 67a. This holding is completely illogical, could lead to dangerous consequences at odds with the ADEA's purposes, and accordingly should be reviewed and reversed by this Court. If allowed to stand, the lower courts' holding would render meaningless the EEOC's regulations on this issue, which both the District Court and Second Circuit have adopted as binding in this case. The holding would also establish a principle, contrary to the ADEA, that the structure and effect of a seniority system is completely irrelevant to its legality.

First, the lower courts determined in the above-quoted holding that because both the pre-merger Pan Am and National pilot seniority lists were based primarily on length of service and therefore as a matter of law "bona fide," the integration of the two lists was also automatically bona fide. This holding has serious implications. It would mean that if the seniority lists of two companies are each based on length of service, and the two companies merge, the resulting merged seniority list will itself be considered to be based on length of service,

and therefore exempt from the ADEA, *regardless of what method or formula was used to merge the lists, and regardless of the effect of such merged list—i.e.*, regardless of whether the merged list is in fact based primarily on length of service.

A common sense interpretation of the ADEA and pertinent cases and regulations demands that the actual method of integrating two seniority lists, and the actual effect of this integration, *must* be scrutinized to determine whether the integration results in a seniority system which is itself based primarily on length of service within the meaning of Section 4(f)(2). In this case, Pan Am's *post*-merger pilot seniority system governs the employment rights of all Pan Am's pilots, and should be examined to determine whether it is based primarily on length of service and therefore bona fide. Pan Am's and National's *pre*-merger pilot seniority systems are irrelevant to this analysis.

The problems which could be caused by the lower courts' ill-considered analysis on this point become obvious when one posits the following situation. Suppose that the seniority list of one company consists solely of employees over age 50 with an average of 30 years service in a craft, with such employees arranged in order of length of service. The seniority list of another company, merging with the first, consists solely of employees under age 30 with an average 10 years of service in the same craft, arranged the same way. Under the lower courts' holding in *Cook*, the two lists could be *legally integrated* by placing all the employees over age 50 *below* all the more junior employees under age 30, simply because the two companies' *pre-merger* lists were based on length of service. This is surely not a result contemplated by the drafters of the ADEA. The fact is that the applicable EEOC regulation states that the seniority system itself—in this case, the merged Pan Am and National pilot system—must be based primarily on length of service.

The lower courts' holding precludes analysis of the merged system by mistakenly focusing on the Pan Am and National lists *before* the merger.

Second, the lower courts further erred in holding that a merged seniority system is "bona fide" by virtue of its being qualified by the pre-merger "expectations" of employees governed by its terms. The lower courts' holding on this issue was based on their acceptance of the spurious argument that (1) before the merger of Pan Am and National, the National pilots had a greater expectation of advancement than did the Pan Am pilots and (2) it was proper and legal for considerable credit to be given for those expectations under the merged system—*even though the National pilots were younger and less experienced than their Pan Am counterparts.* The lower courts found that if the merged Pan Am pilot seniority system had been based completely on length of service, it would have disturbed the "expectations" of the concededly junior National pilots. *Cook* Opinion, App. at 61a. Taking this into account, the lower courts upheld as bona fide the Pan Am pilot seniority system and particularly those aspects thereof specifically intended to fulfill junior pilot expectations.

Such an approach stands in blatant contravention of the EEOC's "bona fide" regulation quoted in Section II of this Petition. Under that regulation, quoted in full above, a seniority system must be based primarily on length of service but "may be qualified by such factors as *merit, capacity, or ability.*" 29 C.F.R. § 1625.8 (1987) (emphasis added). The similarity of the meanings of the words "merit," "capacity" and "ability" clearly indicates that the regulation was intended to permit an employer to establish a seniority system to some extent qualified by *objective, measurable standards of actual job competence and performance.* It was *not* intended to permit the establishment of a seniority system qualified by one group of *junior* employees' wholly spec-

ulative "expectations" that they would or should advance in their new employer's organization more quickly than another group of *senior* employees—particularly when such "expectations" are in no way based on objective criteria of job qualification or competence.

The junior National pilots' pre-merger "expectations," on which the Pan Am pilot seniority system is based, bear no relation to any of the criteria set forth in EEOC's "bona fide" regulation. At no time in the Gill arbitration hearings or during this case was the argument ever made that the National pilots as a group were in any way superior in "merit, capacity or ability" to the Pan Am pilots as a group. Arbitrator Gill never made such an argument in his Award or Opinion, and Pan Am and the Unions have never made such an argument in the course of this action. If anything, it was acknowledged by all of the parties to the Gill Award that the Pan Am pilots, some of whom had *ten years* more credited experience than National pilots to whom the Pan Am pilot system gave superior rights, were *more* able, in the sense of being more seasoned, than the junior National group.

The "expectations" on which the Pan Am pilot seniority system was based were not even indirectly derived from considerations of "merit, capacity and ability." They were instead derived from the rights and entitlement which the generally junior National pilots had developed *vis-a-vis each other* in their own pre-merger seniority system, as well as from an extremely speculative assessment that, unmerged, National Airlines had better future financial prospects than Pan Am. In large part, each National airman could credit any expectation for advancement which he may have had in his previous employ to the fact that he was competing with a far less senior group of pilots at National than were employed by Pan Am at the same time. None of this, of course, has anything to do with "merit, capacity and ability." The National pilots'

expectations also bore no relation to any measure of the National pilots' time served in employment; as found by the lower courts, the very consideration of such expectations constituted a *deviation* from the establishment of a system based on length of service.

The Pan Am pilot seniority system, as approved by the lower courts because of the system's purpose of preserving pre-merger pilot "expectations," violates the letter of the pertinent EEOC "bona fide" regulation. It also violates its spirit, and indeed runs counter to the entire rationale underlying the ADEA. One of the ADEA's primary purposes is to prevent the dilution of the seniority rights of older employees by considerations unrelated to job performance or competence. In promulgating its "bona fide" regulation, the EEOC, citing this Court, stated that "the principal feature of any and every [bona fide] seniority system is that preferential treatment is dispensed on the basis of some measure of time served in employment." 46 Fed. Reg. 47725 (September 29, 1981); *citing California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980). By stating generally that a bona fide seniority system may be qualified by the "expectations" of a group of junior employees, regardless of whether those expectations are reasonable or in any way related to job performance or competence, the lower courts have repudiated this fundamental tenet of the ADEA.

Even if this Court holds that a bona fide seniority system may be "qualified" by the "expectations" of junior employees whose employment rights are governed by its terms, which it should not, it should *still* hold that the lower courts erred in deciding that the Pan Am pilot seniority system is "bona fide" under prevailing law. The Pan Am pilot system is not simply *qualified* by junior employee expectations; it is in fact *based completely* on this factor, both in conception and in practical application. The Gill Opinion, reproduced in the Joint Appendix at 78-136, describes explicitly the basis on which the pilot

system adopted by Pan Am and the Unions was constructed. Arbitrator Gill stated that his proposed system was designed to accomplish four "basic objectives." *See* J.A. at 99-100. The primary two objectives for which the pilot seniority system was designed by Arbitrator Gill relate directly to satisfying pilot "expectations," which Arbitrator Gill proceeded to expand in the case of the junior National pilots. *None* of the four objectives relates directly or indirectly to the principle that "preferential treatment must be dispensed on the basis of some measure of time served in employment."

In practical application as well, the Pan Am pilot system has operated predominantly under the influence of those of its provisions incorporated *exclusively* to preserve the expectations of the junior National pilots. As explained above, the Pan Am pilot system has not distributed every employment benefit in every case to pilots in the strict order of their sequence on the integrated list. Certain provisions in the Gill Award explicitly "conditioned and restricted" the straightforward operation of the integrated list in many circumstances. Unfortunately for Petitioners, these "conditions and restrictions" were not designed to ameliorate, but rather to exacerbate, the impact of the list on older, more senior pilots. Petitioners have produced affidavit testimony, reproduced in the Appendix, showing that the *sole* reason for the inclusion of such conditions and restrictions in the system "was to benefit the former National pilots by reserving positions for them to which they would not be assigned under a date of hire/length of service list" (*i.e.*, to fulfill junior National pilot expectations). App. at 42a. Pan Am could have foreseen that the conditions and restrictions would greatly influence the distribution of pilot assignments under the pilot system and would have a severely adverse effect on senior, generally older pilots.

In sum, the Pan Am pilot seniority system is illegally based on the "expectations" of junior, generally younger,

employees governed by its terms. The lower courts have in effect ruled that a seniority system can allocate superior benefits to younger employees, not because of how long those employees have served or what their abilities are, but simply because of what those younger employees think they deserve.

The lower courts' decision undermines not only the EEOC's regulation, but also a body of more general authority applicable to seniority systems. Most notable among such cases is one decided by this Court, *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980). *Bryant* involved a company rule which established two seniority tracks: one for employees of more than 45 weeks, the other for employees of less. The Court held that the 45-week rule was part of the company's seniority system, and was thus governed by Title VII provisions applicable to seniority systems, because it was *time-based*: "(L)ike any seniority rule, the 45-week requirement *focuses on length of employment.*" 444 U.S. at 609-610. In so holding, this Court stated:

> In the area of labor relations, "seniority" is a term that connotes length of employment. A "seniority system" is a scheme that, alone or in tandem with non-seniority criteria, allots to employees ever-improving employment rights and benefits as their relative lengths of pertinent employment increase. Unlike other methods of allocating employment benefits and opportunities, such as subjective evaluations or educational requirements, *the principal feature of any and every "seniority system" is that preferential treatment is dispensed on the basis of some measure of time served in employment.*

Id. at 606. This principle is undermined by the Pan Am pilot system, which is in no way time-based but rather expectation-based.

In sum, the lower courts seriously erred in holding that "the integration of two bona fide seniority lists in a way

reasonably designed to preserve pre-merger expectations is itself a bona fide seniority system." The first part of the lower courts' holding undermines the letter and spirit of the ADEA and applicable EEOC regulations and case authority by disregarding the structure and effect of a merged seniority system, and instead focusing irrelevantly on pre-merger issues which are of no consequence to a merged company's employees. Second, the idea that a seniority system can be considered 'bona fide" within the meaning of ADEA Section 4(f)(2) when it is wholly based on the "expectations" of younger, junior employees finds no support in the statutory dictates of the ADEA or any regulation or case authority issued pursuant thereto.

IV. THE LOWER COURTS' HOLDING THAT PAN AM'S PILOT SENIORITY SYSTEM IS AS A MATTER OF LAW NOT A "SUBTERFUGE TO EVADE THE PURPOSES OF THE ADEA" WITHIN THE MEANING OF SECTION 4(f)(2) IS LEGALLY ERRONEOUS, CONFLICTS WITH APPLICABLE PRECEDENT AND EEOC INTERPRETATIONS ON THIS ISSUE, AND PURPORTS TO DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

As noted above, even if the Pan Am pilot seniority system were "bona fide" as a matter of law within the meaning of the ADEA's Section 4(f)(2) exemption, which it definitely is not, the lower courts' decision should still be reviewed and reversed by this Court. The lower courts erred in holding that the system has not been maintained as a "subterfuge to evade the purposes of the ADEA."

Under the EEOC's "subterfuge" regulation, quoted in Section II of this Petition, a system may, "depending on the circumstances," be considered a subterfuge if it gives those with longer service lesser rights and results in less favored treatment to those protected by the ADEA. 29 C.F.R. § 1629.8(b) (1987). As to the "treatment" issue,

the lower courts essentially conceded that older, more senior pilots were disadvantaged by the system; the lynchpin of their analysis of the bona fide issue, rebutted above, is that such disadvantageous treatment was justifiable. The lower courts' inquiry into the "circumstances" surrounding the pilot seniority system's implementation was confined to a determination that Pan Am and the Unions had valid business purposes in adopting and effectuating the system. The lower courts' legal analysis of this issue was erroneous and their decision should be reviewed and reversed by this Court.

A. The Lower Courts Erred In Holding That Pan Am Adopted The Pilot Seniority System For Legitimate Business Purposes

The lower courts found that Pan Am's purpose in adopting the pilot system "was its desire to integrate the airlines as quickly as possible with a system that was operationally manageable." *Cook* Opinion, 647 F. Supp. at 823. According to the lower courts, this constituted a legitimate business purpose sufficient to result in a holding on summary judgment that the pilot system could not be a subterfuge to evade the ADEA's purposes: "Pan Am's desire to 'get on with its business' is a legitimate reason for adopting the [Gill] award," *Cook* Opinion, App. at 69a-70a, citing *Cipriano v. Board of Education*, 705 F.2d 51 (2d Cir. 1986).

This holding contorts the business purpose defense, which is based on the assumption that an employer with a legitimate purpose for *structuring a seniority system in a certain way* could not have adopted the system to avoid the ADEA. The business purpose defense does *not* extend to an employer such as Pan Am, which argues that it was eager to adopt and implement *any* seniority system simply to "get on with its business." The lower courts are contradicted by the same authority they cite for support on this point; under *Cipriano*, the employer must show a

legitimate business purpose *for the structure of the system in question. See Cipriano,* 785 F.2d at 58 (employer has obligation of "showing a legitimate reason for *structuring* the plan as it did"). Neither Pan Am nor the Unions have offered any legitimate business purpose for structuring the pilot seniority system so as to subordinate senior, older employees to junior, younger employees, as the current system does. For this reason alone, a writ of certiorari should be granted in this case and the lower courts' holding reversed. Since the business purpose defense has been recognized in decisions involving not only the ADEA but also Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.* (1987), it is not unreasonable to suggest that the lower courts' ruling on this issue imperils reasonable application of both of those statutes.

Furthermore, Petitioners have submitted evidence casting considerable doubt on whether Pan Am actually implemented the current pilot system for the purposes now alleged, and showing that the ends with which Pan Am contends it was then concerned could not possibly have been achieved by adopting this system.[3] But the lower courts refused to even consider the reasonableness of Pan Am's alleged business purposes, stating that "what is important here is what Pan Am *believed* at the time of adoption of the system." *Cook* Opinion, App. at 69a (emphasis added). This statement constitutes a dangerous precedent which this Court should repudiate. The statement is directly contradicted by the only case which the lower courts cited as supporting its position, *Gray v. New England Tel.*

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[3] For example, Pan Am now claims that it decided to adopt the system for economic operational reasons, but as the lower courts themselves noted, Pan Am did *no* cost analysis of the system before so deciding. The lower courts' holding nonetheless approving Pan Am's decision cannot be rationally squared with the Second Circuit case *Paolillo v. Dresser Industries, Inc.*, 813 F.2d 583 (1987), in which the Second Circuit held that an employer is liable under the ADEA if it cannot demonstrate a *clear cost justification* for an employment policy which adversely affects older workers.

& Tel. Co., 792 F.2d 251 (1st Cir. 1986). In *Gray*, the court was called upon to determine whether an employer had a valid business purpose for implementing an allegedly discriminatory policy. The court stated:

> Our focus must be on the perception of the decisionmaker . . . *and whether this perception was credible and reasonable*, in determining whether there is a *jury issue.*

Id. at 256 (emphasis added), *citing Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979) ("The *reasonableness* of the employer's reasons may, of course, be probative of whether they are pretexts [for discrimination]"). In this case, the reasonableness of the "business purpose" offered by the employer merits particular close judicial scrutiny. Here, the lower courts relied, at best, not on what Pan Am *believed*, but on what Pan Am officials *say* Pan Am believed when it decided to adopt the Gill Award. Pan Am bases its assertions in this regard not on documentary evidence prepared contemporaneously with its decision, but on recent deposition testimony of company officials reconstructing a decisionmaking process in the distant past.

It is especially important in a case such as this for a court and/or jury to examine from an objective standpoint the reasonableness of Pan Am's representations as to its purposes for adopting this employment policy. The District Court should have undertaken such analysis, not so as to second-guess Pan Am's business judgment, but so as to responsibly exercise its obligation to determine whether the employer has borne its burden of *showing*, and not simply *claiming*, that it had a legitimate business reason for its actions. *See Cipriano*, 785 F.2d at 58 (employer has the obligation of "*showing* a legitimate business reason for structuring the plan as it did"). Pan Am did not indisputably show a valid business purpose for adopting the seniority system set out in the Gill Award and the lower courts erred in deciding that it did.

B. The Lower Courts Erred In Holding That Pan Am's Bad Faith And Discriminatory Motive Cannot Be Established By Evidence Showing Its Reckless Disregard Of The ADEA In Adopting The Pilot Seniority System

The lower courts held that substantial evidence, submitted below by Petitioners, that Pan Am acted with reckless disregard of the ADEA in deciding to adopt the pilot seniority system does not establish a fact question for trial concerning Pan Am's bad faith and discriminatory motive. By so holding, the lower courts flouted compelling precedent and common sense.

The Second Circuit itself stated, when it decided procedural issues in this action two years ago, that among the circumstances to be considered in connection with the substantive question of "subterfuge" within the meaning of Section 4(f)(2) is whether Pan Am engaged in "*willful discrimination.*" *Cook*, 771 F.2d at 644. The Second Circuit further stated that as to this issue, evidence bearing on whether or not Pan Am and the Unions acted "*in bad faith* or with discriminatory motives" in adopting or agreeing to the seniority system should be explored. *Id.* The definition of "bad faith," established in longstanding precedent in the Second Circuit and others, includes "willfulness." *See, e.g., Matthysse v. Securities Processing Serv., Inc.*, 444 F. Supp. 1009, 1021 (S.D.N.Y. 1977) ("bad faith" is equivalent to "willful ignorance"). Clearly, the Second Circuit bound itself to consider, in its analysis of whether the Pan Am pilot system is a "subterfuge," facts which provided the basis for Petitioners' contention that Pan Am "willfully" violated the ADEA and thereby acted in bad faith.

In *Trans World Airlines v. Thurston*, 469 U.S. 111, 105 S.Ct. 613 (1985), this Court held that an employer "willfully" violates the ADEA *if it "knew or showed reckless disregard for the matter of whether its conduct*

was prohibited by the ADEA." (Emphasis added.) *Id.* at 624, quoting the Second Circuit opinion in the same case, *Air Line Pilots Ass'n v. Trans World Airlines, Inc.*, 713 F.2d 940, 956 (1984). This Court elaborated upon the above definition by citing language from cases involving allegedly "willful" violations of other statutes. *See Nabob Oil Co. v. United States*, 190 F.2d 478 (10th Cir.), *cert. denied*, 342 U.S. 876 (1951); *Darby v. United States*, 132 F.2d 928 (5th Cir. 1943) (Fair Labor Standards Act); *United States v. Murdock*, 290 U.S. 389 (1933) (tax violation). Hence, an employer "wilfully" violates the ADEA if (1) it "wholly disregards the law . . . without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law"; (2) its conduct is "marked by careless disregard for whether or not one has the right to so act"; or (3) it shows "a disregard for the governing statute and an indifference to its requirements." *Id.* at 624-625.

In *Thurston*, this Court applied the above standard to the conduct of TWA and determined that it had not "willfully" violated the ADEA by implementing a transfer/retirement policy applicable to 60 year-old pilots. The Court stated: "TWA officials acted reasonably and in good faith in attempting to determine whether their plan would violate the ADEA." This Court emphasized that "TWA officials met with their lawyers to determine whether the mandatory policy violated the ADEA" and later noted that TWA "sought legal advice and consulted with the union" on this specific issue. *Id.* at 626.

Applying the standards set forth in *Thurston* and the cases upon which it relied, Pan Am clearly acted with "reckless disregard" of the ADEA, and thus willfully violated that Act, by adopting the Gill Award and implementing the pilot seniority system which it mandated. This Court is in fact presented with a textbook case of a

willful violation of the ADEA. Pan Am concedes that it had full knowledge of the specific provisions of the ADEA and was aware that the Gill pilot seniority system would definitely have an adverse impact on employees over the age of 40. Nonetheless, by its own admission, offered repeatedly in depositions, Pan Am never investigated, either on its own or through legal counsel, whether the system might possibly violate the ADEA. In fact, Pan Am never even investigated or inquired as to whether the system would possibly violate *any* federal or state statute. In short, Pan Am undertook absolutely no investigation to determine the legality of a seniority system which was to govern indefinitely the careers and lives of over two thousand of its employees. The senior Pan Am official responsible for Pan Am's decisions in this matter explicitly stated in deposition that even though "any logic would say that there would be an impact" on older pilots if Pan Am adopted the Gill Award, he had a predisposition to "go with it"—"unless it was *horribly expensive* or *blatantly* illegal, immoral and wrong." [4]

The actions of Pan Am officials in this case stand in stark contrast to those of the TWA officials in *Thurston*, who were found not liable for willfully violating the ADEA because they sought advice from both company and union counsel on the legal issues raised in that case. *Thurston*, 105 S.Ct. at 626. But Pan Am's actions are similar to, and if anything evidence more recklessness than, those of numerous defendants found liable of willful statutory violations.[5] In fact, in no reported case has

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[4] *See* Deposition of Martin Shugrue, Pan Am's Vice Chairman, on file with the Clerk of the Court for the Second Circuit; p. 56-57 (emphasis added).

[5] *See United States v. Illinois Cent. R. Co.*, 303 U.S. 239 (1938) (willful violation found where defendant showed "careless disregard for whether or not it had the right to so act"); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), *cert. de-*

a defendant disregarded a statute as blatantly as Pan Am did here without being held liable for a willful or bad faith violation thereof. That Pan Am apparently did not undertake an inquiry into its legal obligations in this matter after learning of the Gill system's potential (and ultimately realized) adverse impact on older pilots with longer service can only be attributed to a conscious effort on its part to close its eyes to the requirements of the law.

The lower courts were similarly blind to the long line of authority compelling the result urged by Petitioners. In deciding this issue in Respondents' favor, the lower courts attempted to distinguish between the "intentional" and "willful" standards in the ADEA, contending that the willful standard is only to be applied to the question of whether liquidated (*i.e.*, double) damages should be assessed as to a violation *already* found to be intentional. The lower courts ignored a basic point of law: in any criminal or civil *mens rea* analysis, the term "willful" defines a *more culpable* state of mind, calling for a *more* stringent penalty, than does the term "intentional." Under the ADEA, a violation judged to be "intentional" is penalized by an assessment of compensatory damages; a violation judged to be "willful" is penalized by an assessment of double damages. 29 U.S.C. § 625(b) (1987). This is not a quirk in the law. It reflects a sensible determination that if a defendant is

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nied, 434 U.S. 1086 (1978) (willful violation found where defendant knew of statutory obligation but did not take steps reasonably calculated to resolve doubt about its application); *F.X. Messina Constr. Corp. v. Occupational S. & H.R.C.*, (1st Cir. 1974) (willful violation found where defendant was "indifferent to the requirements of the law"); *Sims*, 82-5438, slip op. (S.D.N.Y. June 26, 1986) (bad faith violation found where defendant made no effort to learn and comply with law's requirements); *Dowd v. Blackstone Cleaners, Inc.*, 306 F. Supp. 1276 (N.D. Tex. 1969) (willful violation found where defendant did not obtain legal opinion as to application of statute).

confronted with a legal requirement (*e.g.*, a prohibition of employment policies which adversely affect older workers) and deliberately refuses to investigate its obligations under that requirement, its intent to violate the requirement is to be assumed and it is to be punished additionally for its willfulness. Under the ADEA, as in the case of a simple speed limit on a highway, a fundamental rule applies: ignorance of the law is not an excuse.

This Court has defined the term "subterfuge," as it appears in ADEA Section 4(f)(2), as "an artifice of evasion." *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977). It is not possible for a company to more blatantly evade a statute's purposes than by completely ignoring it in its rush to implement a policy which it knows will adversely affect older workers.

C. The Lower Courts Erred in Holding That An Employer's Actual Discriminatory Intent Must Be Proven By Direct Evidence In Order To Show That A Seniority System Is A "Subterfuge To Evade The Purposes of The ADEA"

The lower courts' holding on the subterfuge issue is based on the premise that direct evidence of actual discriminatory intent—*i.e.*, a "smoking gun"—must be presented by a plaintiff in order to prove that a seniority system is a "subterfuge to evade the purposes of the ADEA," and thereby avoid summary judgment on this issue. The lower courts' ruling shifts the burden of proof on the subterfuge issue to Petitioners in this action, when in fact it should have been placed upon Respondents. *See, e.g., Crosland*, 686 F.2d at 212 (4th Cir. 1982). As discussed above, Petitioners have adduced evidence which bears directly on the subterfuge issue, and which should have been sufficient to assure that this issue would not be decided by summary judgment against Petitioners.

The ADEA does not require Petitioners to show more than they have, nor should the lower courts have done so.

In stating summarily that "when a seniority system is at issue, plaintiffs must show discriminatory intent as part of their *prima facie* case," *Cook* Opinion, App. at 70a, fn. 7, the lower courts could only cite for support one case: *Air Line Pilots Ass'n Int'l v. Trans World Airlines, Inc.*, 547 F. Supp. 1221 (S.D.N.Y. 1982), *aff'd in part and rev'd in part*, 713 F.2d 940 (2d Cir. 1983), *aff'd in part and rev'd in part*, 469 U.S. 613 (1985). That case is hardly compelling precedent. First, the ultimate issues in that case, as to which the District Court was reversed by the Second Circuit and this Court, did not pertain at all to the District Court's *dictum* on Section 4(f)(2). Second, as explained below, the District Court in the above-cited case blatantly misapplied Title VII authority[6] with no regard for clear differences between the seniority system provisions in Title VII and the ADEA.

Section 4(f) of the ADEA, quoted above, does not address the issue of whether a seniority system is maintained with discriminatory intent. Furthermore, the EEOC's interpretation of the "subterfuge" clause clearly dictates that a seniority system violates the ADEA if it "gives those with longer service lesser rights," regardless of the employer's intent. 29 C.F.R. § 1625.8 (1987). In contrast, Section 703(h) of Title VII contains a provision, not contained in the ADEA, that *specifically* exempts from Title VII's prohibitions a bona fide seniority system *maintained free of discriminatory intent*:

Sec. 703

(h) Notwithstanding any other provision of this title, it shall *not be an unlawful employment practice*

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[6] *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982).

> for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment, pursuant to a *bona fide seniority or merit system*, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are *not the result of an intention to discriminate* because of race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (1987). There is no corollary "intent" requirement in the ADEA.

Furthermore, the absence of the "intent" language in Section 4 of the ADEA reflects a considered legislative judgment that seniority systems should be treated differently under the ADEA than under Title VII. The ADEA was passed three years after the Civil Rights Act of 1964. Several of its most significant sections are quite similar to the corresponding sections of Title VII, including those which generally describe the various prohibited employment practices[7] and which govern the timeliness of discrimination charges.[8] However, where Title VII and the ADEA address the same issue by using totally different language, it clearly reflects a legislative decision that the two statutes involve different legal and policy considerations as to that issue, and the sections should not be viewed as interchangeable. Such is the case with the bona fide seniority system exemptions. If Congress had desired that "unintentionally" discriminatory seniority systems be exempt from the ADEA, it could have easily incorporated the language contained in Section 703(h) of Title VII into the ADEA, just as it utilized other Title VII provisions. But instead of mimicking Title VII's intent requirement, Congress excluded

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[7] Title VII: 42 U.S.C. § 2000e-2(a)-(d); ADEA: 29 U.S.C. § 623(a)-(d).

[8] Title VII: 42 U.S.C. § 2000e-5(e); ADEA: 29 U.S.C. § 626(d).

the "intent" language from the ADEA and only exempted systems which are not "a subterfuge to evade the purposes of the Act."[9] Hence, to transplant Title VII to the ADEA arena in regard to the intent issue ignores the *deliberate omission* in the ADEA, and the EEOC regulations, of the requirement, found only in Title VII, that grievants challenging a seniority system on age grounds must prove discriminatory intent.

In their misguided invocation of Title VII authority on the intent issue, the lower courts have undermined two established lines of cases decided under the ADEA. First, no less than eight federal circuits have adopted, and none have rejected, the view that an employment policy which is shown to have a disadvantageous impact on older workers constitutes a violation of the ADEA, even if there is no showing that the employer had a discriminatory intent in implementing the policy. This Court has not rejected this view, despite having had the opportunity to do so. *See Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981). *See also Holt v. Gamewell Corp.*, 797 F.2d 36 (1st Cir. 1986); *EEOC v. Western Electric Co.*, 713 F.2d 1011 (4th Cir. 1983); *Thornborough v. Columbus and Greenville Railroad Co.*, 760 F.2d 633 (5th Cir. 1985); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686 (8th Cir. 1983); *Kelly v. American Standard*, 640 F.2d 974 (9th Cir. 1981); *EEOC v. Sandia Corp.*, 639 F.2d 600 (10th Cir. 1980); *Allison v. Western Union Telegraph Co.*, 680 F.2d 1318 (11th Cir. 1982). In the absence of explicit language in Section 4(f)(2) of the ADEA or the EEOC's regulations, it is not reasonable to impose an "intent" requirement in this case, particularly in the face of overwhelming evidence that Pan Am's pilot seniority system has a severely adverse impact on older pilots.

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[9] *See* 113 Cong. Rec. 31,254 (statement of Sen. Yarborough); *Id.* at 34,752 (statement of Rep. Dwyer).

Second, even if this Court determines that Section 4(f)(2) does carry some "intent" requirement, it is a matter of established law in other circuits that such intent can be proven by circumstantial evidence:

> To be sure, this [i.e., showing discrimination because of age] can be done in many ways. Direct evidence of discriminatory intent, e.g., a paper scrap with the notation "lay-off—too old" beside a plaintiff's name, would of course suffice. (But) circumstantial evidence of employer subterfuge also would suffice so long as it serves the general purpose of supporting the asserted proposition and excluding other propositions.

Williams v. General Motors Corp., 656 F.2d 120, 130 (5th Cir. 1981).

Finally, the policy reasons for excluding the "intent" requirement from the ADEA's seniority system exemption are easily deduced. As this Court has recognized in *Bryant*, quoted above, seniority systems by their very nature are supposed to favor senior, generally older, employees. Thus, any seniority system which operates, as Pan Am's pilot system does, to the detriment of senior workers should be presumed to have been designed intentionally for that purpose, and should not be extended preferential treatment under the Section 4(f)(2) exemption.

In sum, the lower courts' holding on this issue is bereft of both precedental and policy support.

III. CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted. The lower courts erred in holding on summary judgment that the Pan Am pilot seniority system is "bona fide." The lower courts' analysis fails to properly focus on the construction and effect of a merger company's *integrated* seniority system, and

whether that merged system is based primarily on length of service, and instead focuses irrelevantly and illogically on the two companies' *pre-merger* seniority systems. The lower courts' analysis also attacks the very underpinnings of the ADEA by exalting the career expectations of younger, more junior employees and subordinating those of older, more senior employees within the ambit of the ADEA's protection. Further, the lower courts erred in holding that the Pan Am system is not a "subterfuge to evade the ADEA." The Pan Am pilot system has not been proven to have been adopted for a legitimate business purpose. It *has* been shown to have been adopted in reckless and willful disregard of the ADEA.

In sum, this case merits the Court's attention. The legal errors committed by the lower courts below, and discussed herein, threaten the interests of literally millions of older individuals in every industry whose employment rights are governed by seniority systems, and who ultimately depend on a rational application of the ADEA's provisions to ensure that those rights are not taken from them.

Respectfully submitted,

JEFFREY C. LONDA
HUTCHESON & GRUNDY
3300 Citicorp Center
Houston, Texas 77002-4579

ROBERT E. COHN
KEVIN F. FLYNN
SHAW, PITTMAN, POTTS
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
Counsel for Petitioners

JEFFREY BERNBACH
521 Fifth Avenue
New York, New York 10175
(212) 687-9730
Of Counsel for Petitioners

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No. 84 CIV. ———

JURY TRIAL DEMANDED

JOHN C. COOK, *et al.*;

Plaintiffs

- against -

PAN AMERICAN WORLD AIRWAYS, INC.; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; AIR LINE PILOTS ASSOCIATION, PAN AM CHAPTER; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, PAN AM CHAPTER;

Defendants.

COMPLAINT

John C. Cook, *et al.*, Plaintiffs, by and through their attorneys, Butler & Binion, file this Complaint against Pan American World Airways, Inc. ("Pan Am"); Air Line Pilots Association, International ("ALPA"); Air Line Pilots Association, Pan Am Chapter ("ALPA-PAA"); Flight Engineers International Association ("FEIA"); and Flight Engineers International Association, Pan Am Chapter ("FEIA-PAA"). In support of this Complaint, Plaintiffs will show the Court the following:

I.

PARTIES

1. Appendices A and B, attached hereto and made a part hereof, constitute a list of 439 Plaintiffs compiled

as of the date of filing. Additional Plaintiffs are expected to "opt in" to this action.

2. Defendant Pan Am has continuously been and is now a New York corporation. It has no registered agent listed with the office of the Secretary of State for the State of New York. Therefore, it may be served with process by serving an officer of said corporation at its headquarters offices, located at the Pan Am Building, 200 Park Avenue, New York, New York, 10166. Pan Am is doing business in and has substantial contacts with the State of New York and City of New York, where it is engaged in the aviation business and employs more than twenty employees. Defendant Pan Am has continuously been and is now an employer engaged in an industry affecting commerce within the meaning of Sections 11(b), (g) and (h) of the ADEA, 29 U.S.C. §§ 630(b), (g) and (h).

3. Defendant ALPA has continuously been and is now an unincorporated association which represents pilots employed by Pan Am and other airlines concerning terms and conditions of employment. Defendant ALPA is made up of "chapters," each of which represents the pilots employed by a particular airline. Defendant ALPA may be served with process by serving the president, Secretary/Treasurer, or a business representative of said association at its offices located at 1625 Massachusetts Ave., N.W. Washington, D.C. 20036. Defendant ALPA has substantial contacts with the State of New York and City of New York. Defendant ALPA has continuously been and is now a labor organization engaged in an industry affecting commerce within the meaning of Sections 11(d and (e) of the ADEA, 29 U.S.C. §§ 630(d) and (e). Defendant ALPA is subject to and must comply with the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, made applicable to the aviation business by 45 U.S.C. § 181, *et seq.*

4. Defendant ALPA-PAA has continuously been and is now an unincorporated association which represents pilots employed by Pan Am concerning terms and conditions of employment, and is a chapter of Defendant ALPA. It may be served with process by serving the President, Secretary/Treasurer, or a business representative of said association at its offices located at 200 Park Avenue, New York, New York, 10166. Defendant ALPA-PAA has continuously been and is now a labor organization engaged in an industry affecting commerce within the meaning of Sections 11(d) and (e) of the ADEA, 29 U.S.C. §§ 630(d) and (e). Defendant ALPA is subject to and must comply with the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, made applicable to the aviation business by 45 U.S.C. § 181, *et seq.*

5. Defendant FEIA has continuously been and is now an unincorporated association which represents flight engineers employed by Pan Am and other airlines concerning terms and conditions of employment. Defendant FEIA is made up of "chapters," each of which represents the flight engineers employed by a particular airline. Defendant FEIA may be served with process by serving the President, Secretary/Treasurer, or a business representative of said association at its offices located at 905 - 16th St., N.W., Washington, D.C. 20006. Defendant FEIA has continuously been and is now a labor organization engaged in an industry affecting commerce within the meaning of Sections 11(d) and (e) of the ADEA, 29 U.S.C. §§ 630(d) and (e).

6. Defendant FEIA-PAA has continuously been and is now an unincorporated association which represents flight engineers employed by Pan Am concerning terms and conditions of employment, and is a chapter of Defendant FEIA. It may be served with process by serving the President, Secretary/Treasurer, or a business representative of said association at its offices located at Roosvelt Field, Garden City, N.Y. Defendant FEIA-

PAA has continuously been and is now a labor organization engaged in an industry affecting commerce within the meaning of Sections 11(d) and (e) of the ADEA, 29 U.S.C. §§ 630(d) and (e).

II.

JURISDICTION AND VENUE

7. Jurisdiction of this Court is invoked to a) 28 U.S.C. §§ 451 and 1343; b) 28 U.S.C. § 1337; and c) the principle of pendant jurisdiction. This is an action authorized and instituted pursuant to a) Section 7(c), 29 U.S.C. § 626(c), of the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), 28 U.S.C. § 621, *et seq.*, which incorporates by reference Sections 16(b) and 17, 29 U.S.C. §§ 216(b) and 217, of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.*; b) the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, as made applicable to the above-named Defendants by 45 U.S.C. § 181, *et seq.*, and c) the New York Human Rights Law, N.Y. Exec. Law § 290, *et seq.* (McKinney 1983).

8. The unlawful employment practices alleged below have been and are now being committed within the State of New York, in the Southern District. Venue in this Court is thus proper under 28 U.S.C. §§ 1391(b) and 1392(a).

III.

FACTUAL ALLEGATIONS

9. Plaintiffs John C. Cook, *et al.*, are all over 40 years of age, are and/or have been employed as Pilot-Flight Engineers by Defendant Pan Am, and are members and/or apprentice members of the Defendants ALPA, ALPA-PAA, FEIA, and FEIA-PAA. All of the Plaintiffs whose names are listed in Appendix A filed charges, containing some or all of the allegations stated herein, in one or more

of the following federal and state equal employment offices: a) the New York Regional Office of the U.S. Equal Employment Opportunity Commission;[1] b) the Miami District Office of the U.S. Equal Employment Opportunity Commission;[2] c) the San Jose Area Office of the U.S. Equal Employment Opportunity Commission;[3] d) the New Jersey Division on Civil Rights;[4] e) the New York State Division of Human Rights;[5] and f) the California Department of Fair Employment and Housing.[6] The above-referenced charges were filed between the dates of April 12, 1983, and September 2, 1983. This civil action is thus being commenced more than sixty days after the filing of all of the above-referenced charges, in compliance with the requirements in Section 7(d) of the ADEA, 29 U.S.C. § 626(d). The Plaintiffs listed in Appendix B did not file charges in federal or state equal employment offices, but are similarly situated individuals, with similar or identical claims against the Defendants, and are thus properly joined as Plaintiffs. This Complaint will be amended by the addition to Appendix B of other similarly situated Plaintiffs "opting in" to the action.

10. In 1980, Defendant Pan Am merged with National Airlines ("National"). Defendants ALPA and FEIA, through their chapters representing Pan Am and National pilots and flight engineers (i.e. chapters now consolidated as Defendants ALPA-PAA and FEIA-

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[1] 90 Church Street, Room 1501, New York, New York 10007.

[2] DuPont Plaza Center, Suite 414, 300 Biscayne Boulevard Way, Miami, Florida 33131.

[3] Crocker Plaza Building, 84 West Santa Clara, San Jose, California 95113.

[4] 180 University Avenue, Newark, New Jersey.

[5] 270 Broadway, New York, New York.

[6] 322 W. First Street, Los Angeles, California 90012.

PAA), submitted to an arbitrator the integration of the pilot and flight engineer seniority lists of the to-be-merged companies. Defendant Pan Am expressly reserved the right to accept or reject the resulting arbitration award, which was issued on March 12, 1981. However, Defendant Pan Am subsequently accepted and implemented the Award in its entirety.

11. The pilot seniority list resulting from the arbitration award was first implemented on a system-wide basis on March 28, 1983, has been implemented continuously up until the present time, and will continue indefinitely to be implemented, by Defendant Pan Am with the active support and/or acquiescence of Defendants ALPA, ALPA-PAA, FEIA, and FEIA-PAA. The major characteristics of Pan Am's current pilot seniority system are as follows.

First, there are three cockpit positions on Pan Am's aircraft: two are pilot positions (Captain and First Officer), the third is the less rewarding and less lucrative Flight Engineer position. Under the current Pan Am pilots seniority system, pilots who worked for National before the merger of Pan Am and National may not be "bumped down" to the Flight Engineer position. Pilots who worked for Pan Am before the merger may be so demoted.

Second, rather than merging the pilot seniority lists of Pan Am and National such that the seniority position of each pilot would depend on his amount of credited experience, the current pilot seniority list uses a ratio to insert large numbers of former National pilots under age 40 ahead of older and more experienced Pan Am pilots over the age of 40.

Third, all pilot furloughs (i.e., layoffs) before 1986 are to proceed according to a one-for-one formula, whereby equal numbers of former Pan Am and former National pilots are furloughed, regardless of relative credited experience or relative position on the seniority list.

12. On March 28, 1983, Defendant Pan Am caused to be issued assignments ("assignments") to its flight deck crew personnel, based on the pilot and flight engineer seniority system.

13. On June 15, 1983, Defendant Pan Am caused to be furloughed, under the above-described pilot seniority system, three of the Plaintiffs named in Appendix A: Robert L. Jarboe, Clifford E. Cool, and Richard V. Paul.

IV.

LEGAL CAUSES OF ACTION

14. By using and adopting, and by indefinitely continuing to use and adopt, the above-described seniority system in making employment decisions, Defendant Pan Am has limited, segregated and classified the Plaintiffs so as to deprive or tend to deprive them of employment opportunities and otherwise adversely affect Plaintiffs' status as employees, because of Plaintiffs' age, and will continue to do so, in willful and continuous violation of Section 4(a) of the ADEA, 29 U.S.C. § 623(a).

15. By using and adopting, and by indefinitely continuing to use and adopt, the above-described seniority system in making employment decisions, Defendant Pan has discriminated and will continue to discriminate against Plaintiffs in compensation and terms, conditions and privileges of employment because of age, in willful and continuous violation of Section 296 of the New York Human Rights Law, N.Y. Exec. Law § 296.

16. By actively supporting and/or acquiescing in, and by indefinitely continuing to actively support and/or acquiesce in, the above-described seniority system, Defendants ALPA, ALPA-PAA, FEIA, and FEIA-PAA have limited, segregated, and classified their membership so as to deprive or tend to deprive the Plaintiffs of employment opportunities, limit Plaintiffs' employment opportunities, and otherwise adversely affect the Plaintiffs' status as employees, and will continue to do so, on the

basis of their age, in willful and continuous violation of Section 4(c) of the ADEA, 29 U.S.C. § 623(c), and Section 296 of the New York Human Rights Law, N.Y. Exec. Law § 296.

17. By actively supporting and/or acquiescing in, and by indefinitely continuing the support and/or acquiesce in, the above-described seniority system, Defendants ALPA, ALPA-PAA, FEIA, and FEIA-PAA have discriminated and will continue to discriminate against Plaintiffs because of age, in willful and continuous violation of Section 296 of the New York Human Rights Law, N.Y. Exec. Law § 296.

18. By actively supporting and/or acquiescing in, and by indefinitely continuing the support and/or acquiesce in, the policies and practices complained of in the above paragraphs, the representation of Plaintiffs' interests by Defendants ALPA, ALPA-PAA, FEIA, and FEIA-PAA has been and will continue to be arbitrary, discriminatory and/or in bad faith. Defendants have thereby breached their duty under the Railway Labor Act, 29 U.S.C. § 151 *et seq.*, to fairly represent the interests of the Plaintiffs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Grant preliminary and permanent injunctions prohibiting defendants Pan Am, ALPA, ALPA-PAA, FEIA, and FEIA-PA from taking or causing to be taken any actions based on the illegal seniority system described herein, and correcting all past actions taken on the basis thereof, and further ordering Defendant to construct and implement a seniority system which eradicates the effects of the past and present unlawful employment practices described herein.

B. Order Defendants Pan Am, ALPA, ALPA-PAA, FEIA, and FEIA-PAA to make Plaintiffs whole by an award of damages.

C. Order defendants Pan Am, ALPA, ALPA-FEIA, FEIA, and FEIA-PAA to pay liquidated damages to Plaintiffs, in light of Defendants' willful violation of the law.

D. Order Defendants to pay Plaintiffs' attorneys' fees and costs, including court costs.

E. Grant such other and further relief as this Court may deem just and proper.

Respectfully submitted,

BUTLER & BINION

/s/ Jeffrey C. Londa
By: JEFFREY C. LONDA
1600 Allied Bank Plaza
Houston, Texas 77002
(713) 237- 3270
ROBERT E. COHN
KEVIN F. FLYNN
1747 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20006
(202) 466-6900
Counsel for Plaintiffs

Of Counsel:

/s/ Jeffrey Bernbach
JEFFREY BERNBACH
521 Fifth Avenue
New York, New York 10175
(212) 687-9730

JURY TRIAL

Plaintiffs request a jury trial on all questions of fact raised by their Complaint.

/s/ Jeffrey C. Londa
JEFFREY C. LONDA

Dated, March , 1984

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No. 84 CIV. ———

JOHN C. COOK, *et al.*;

- against - *Plaintiffs*

PAN AMERICAN WORLD AIRWAYS, INC.; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; AIR LINE PILOTS ASSOCIATION, PAN AM CHAPTER; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, PAN AM CHAPTER;

Defendants.

VERIFICATION OF COMPLAINT

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

JOHN C. COOK, being duly sworn, deposes and says:

1. I am one of the Plaintiffs in the above action.

2. The facts pleaded in the foregoing Complaint are true and correct to the best of my knowledge, information and belief.

/s/ John C. Cook
JOHN C. COOK

Sworn to before me this
14th day of March, 1984

/s/ Linda L. Natoli
Notary Public
LINDA L. NATOLI
Notary Public, State of New York
No. 24-4743274
Qualified in Kings County
Commission Expires March 30, 1985

MERGER OF PAN AM AND NATIONAL AIRLINES FLIGHT DECK CREW MEMBER SENIORITY LISTS

ARBITRATION

AWARD

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AWARD

I. INTEGRATED SENIORITY LISTS

There shall be two integrated seniority lists, one including National Pilots and all persons on the Pan Am Pilots' System Seniority List on January 18, 1980, and the other including National Flight Engineers and all persons on the Pan Am Pilots' System Seniority List on January 18, 1980.

A. *Pilot List.* This list shall be constructed as follows:

1. For airmen hired before February 22, 1964, by date of hire.

2. Thereafter, straight length of service through D. J. Slattery (P1289).

3. Beginning immediately after Slattery, insert National Pilots from Seattle (N231) through Godwin (N241).

4. Immediately below Godwin, begin a ratio in sequence of 1 National, 3 Pan Am (repeated 3 times), then 1 National and 4 Pan Am, then 1-3 4 times, 1-4 once, and so on through Southard (N496) and Bandy (P2112). *Exception*: Add 1 Pan Am Pilot at a point one-quarter of the way down the ratio portion of the list, 1 more Pan Am at the halfway point, 1 more Pan Am at the three-quarter point.

5. Beginning immediately below Southard, resume straight length of service for all those in active service as of January 18, 1980.

6. Those on furlough on January 18, 1980, with recall rights, shall be slotted into the list at the time of their recall, based on the relative length of service of the others on the list at that time. *Exception*: Those on furlough who had been

given notice of recall before January 18, 1980, and either had actually resumed work shortly after that date or had their scheduled recalls cancelled upon announcement of the merger, shall, upon recall, be slotted into the list based on the relative length of service of the others on the list as of January 18, 1980. This covers those on Pan Am roster McConnell (P2232) through Myers (P2265).

B. *Engineer List.*

1. Straight date of hire for all NAL Flight Engineers hired before February 22, 1964 and all PAA Flight Engineers hired prior to February 22, 1964; followed by

2. All PAA Pilots hired prior to February 22, 1964, and who, by virtue of the Pan Am Crew Complement Agreement dated May 13, 1963, have a right to bid Flight Engineer positions; followed by

3. All remaining NAL Flight Engineers, and all remaining PAA Pilots through Myers (P2265) merged by length of service on January 18, 1980; followed by

4. Those remaining PAA Pilots on furlough on January 18, 1980 with recall rights, who shall be slotted into the list at the time of their recall, based upon the relative length of service of the others at that time.

II. DEFINITIONS

As used hereinafter, the following terms shall have the meanings indicated:

A. A "NAL" Pilot is a Pilot who was in the employ of National Airlines prior to January 18, 1980. A "NAL

Flight Engineer" is a Flight Engineer who was in the employ of National Airlines prior to that date. A "PAA Pilot" is a Pilot who was in the employ of Pan American prior to that date. Unless the context otherwise provides, that term includes all individuals on furlough as of that date and those individuals hired as Pilots who are now serving as Flight Engineers on Pan Am. A "PAA Flight Engineer" refers to the PAA Appendix A Flight Engineers. The term "group" has reference to all of either the NAL or PAA Pilots or NAL or PAA Flight Engineers in the employ of their respective companies prior to January 18, 1980.

B. "Status" means the state or condition of a Captain, First Officer or Flight Engineer.

C. "Equipment" means a particular type of aircraft, i.e., B-747, DC-10, L-1011 or B-727.

D. "Category" or "Position", used interchangeably herein, means an airman position of Captain, First Officer or Flight Engineer in particular equipment, i.e., B-747 First Officer, B-727 Captain, or L-1011 Flight Engineer.

E. "Vacancy" means an available position not yet occupied by an airman.

F. "Bid" means the contractual process by which Pilots and Flight Engineers at the time of a proffer, affirmatively express their desire for a given vacancy or vacancies. Following the receipt of bids, the Company awards vacancies.

G. "Assignment" means the contractual process by which Pilots or Flight Engineers are involuntarily given positions by the Company.

H. "Reduction in Force" means the contractual process by which the Company reduces the number of positions in a given status and equipment.

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I. "Bump" means the contractual process by which a more senior Pilot or Flight Engineer may exercise his seniority to displace a more junior Pilot or Flight Engineer from the junior Pilot's or Flight Engineer's position.

J. "Displacement" means the contractual process by which a Pilot or Flight Engineer loses or relinquishes his position as a result of either a reduction in force or a bump.

K. "Furlough" means the process by which airmen are removed from the Company's active force by reason of lack of work.

L. Company shall refer to Pan American World Airways.

M. "Proffer" means the process by which the Company makes vacancies available for bid.

N. "Base" means a location at which Pilots and Flight Engineers are stationed or domiciled and from which the Company conducts flight operations in one or more type(s) of equipment.

O. "Replacement aircraft" means any new type of aircraft acquired by the Company for use in lieu of any similar (in terms of range and capacity) aircraft now in the fleet. Specifically, with regard to the B-727, replacement aircraft may include B-737, B-757, B-767, A-300 and/or DC-9 aircraft, without being limited to those types.

III. RESOLUTION OF DISABILITY

Any dispute relating to the application, implementation, or interpretation of this Award shall be initially presented to a standing commtitee composed of two (2) NAL Pilot, two (2) PAA Pilot, two (2) NAL Flight Engineer, and two (2) PAA Flight Engineer Merger Representatives, to be appointed by their respective Mas-

ter Executive Councils (or appropriate FEIA bodies) immediately following the issuance of this Award. In the event that the dispute cannot be resolved by the Committee by majority vote and reduced to writing and signed, it shall be submitted for resolution to a neutral arbitrator. The neutral arbitrator shall be one mutually agreed upon by all the parties, if he is available. If he is not, nine (9) names shall be drawn from a hat containing the names of all arbitrators on the then-effective ALPA approved list. The parties shall then engage in the striking procedure set forth in ALPA's Merger Policy. All disputes resolved under these procedures, either by standing committee or arbitration, shall become a part of the Award and shall be final and binding.

Any dispute arising between the Merger Representatives on the one hand and the Company on the other shall be arbitrated. The method of selecting the arbitrator shall be as specified in the Agreement between the Company and the Air Line Pilots Association, International In no event shall System Board of Adjustment procedures be utilized to resolve such disputes, unless all affected Merger Representatives agree. In the event of the death, resignation or other inability of any Merger Representative to serve, the other Merger Representative from that group (NAL Pilot, PAA Pilot, NAL Flight Engineer, PAA Flight Engineer) shall have the right to designate a successor representative from the group he represents.

IV. CONDITIONS AND RESTRICTIONS

A. *No system flush.* Pilots or Engineers holding base station category awards on the date of this Award may not be displaced by Pilots or Engineers formerly employed by the other airline, regardless of system seniority, unless specifically permitted by a provision in this Award, nor shall the expiration of the conditions and restrictions set forth herein, in themselves, be the oc-

casion for the displacement or excess of any Pilot or Engineer from a base station category award held on such expiration date.

B. *Restriction on 747 and DC-10-30 Captain Vacancies.* Subsequent to January 1, 1986, so long as the sum of 747 and DC-10-30 aircraft does not exceed 51, all Captain vacancies on such aircraft shall be allocated on a ratio of 9.66 Pan Am to 1 National, as follows: 10 Pan Am to 1 National, then 9 Pan Am to 1 National, then 10 Pan Am to 1 National, then repeat same sequence. (See explanatory comments.)

All such Captain vacancies exceeding 437 (the number corresponding to 45 747's and 6 DC-10-30's) shall be awarded by system seniority.

> (No allocation is provided as to First Officer or Flight Engineer seats on 747 and DC-10-30 aircraft. After January 1, 1986, all of *those* vacancies shall be awarded by system seniority.)

C. *Cross bidding.* As before on each airline. Pan Am airmen continue cross-bidding practices vis-a-vis each other, but Pan Am Pilots cannot bump National Engineers. National Pilots cannot bid Engineer positions, National Engineers cannot bid Pilot positions. National Engineers to have some rights as Pan Am Appendix A Engineers against being displaced from Engineer seats by Pilots.

D. *New flying.* Up until January 1, 1986, except as otherwise provided in this Award, all vacancies above the reserved levels on 747, 1011, DC-10 and 727 aircraft and all vacancies on other types of aircraft which may be placed in service, shall be awarded in the ratio of 2 Pan Am airmen to 1 National airman.

E. *Furloughs.* After January 1, 1986, furloughs go by the list. Up until January 1, 1986, furloughs shall be made in the following sequence:

1. National airmen in the "constructive notice" category (defined below) and any Pan Am airmen who have been recalled from furlough and slotted into the list below some or all of the constructive notice airmen. As between those two groups, the furloughs will be proportionate to the numbers in each group. (*Examples*: If there are 100 in the constructive notice group and 200 returned furloughees below them on the list, the sequence would be 1 National to 2 Pan Am; if there were 150 such returned furloughees, the sequence would be 1 National, 2 Pan Am, 1 National, 2 Pan Am; if there were 50 such returned furloughees, the sequence would be 2 National, 1 Pan Am.)

2. Above those two groups, the furloughs shall be on a one-to-one basis, in the following sequence: 3 Pan Am airmen, then 2 National Pilots and 1 National Engineer.

3. Recalls of all those thus furloughed shall be in the inverse order of the furloughs.

Definition of "constructive notice" airmen. Includes all National Engineers beginning with Conley (N275) and all National Pilots beginning with Chiabotti (N583).

F. *Protection of flying until January 1, 1986.*

1. *Protection of 747, 1011 and DC-10 flying.* Category vacancies up to the numbers specified below, and any additional vacancies occasioned by the number of aircraft listed, shall be reserved for the airmen of the respective airlines which flew the aircraft prior to the merger:

Category	Aircraft	Number	Vacancies
Captain	747	45	396
F/O	747	45	513
FEO	747	45	527
Captain	1011	12	97
F/O	1011	12	114
FEO	1011	12	108
Captain	DC-10	16	110
F/O	DC-10	16	98
FEO	DC-10	16	108

Vacancies in excess of those listed above which are created by additional aircraft in any of these categories above the number of aircraft listed (45, 12, or 16) shall be allocated in the proportion of 2 Pan Am airmen to 1 National airman as specified in the New Flying provision.

2. *Protection of 727 flying.*

(a) All B-727 flying (Captains, F/O's and FEO's) in connection with the IGS flying now based in Berlin shall be reserved to the Pan Am Pilots & FEO. The total number of Captain, F/O, and FEO positions thereby reserved and occupied at any time shall be counted as Pan Am positions in the operation of the ratio provisions below.

(b) All awarding of vacancies, reductions in force, or other staffing changes in the B-727 (or any replacement aircraft) shall be accomplished in order to allocate Captain, F/O and FEO positions to the two groups in ac-

cordance with the ratio which most closely approximates the following:

	National	Pan Am
Captain	242	86
F/O	414	86
FEO	219	91

(c) On any particular proffer, vacancies shall be awarded first to the airmen of one group or the other to the extent necessary to achieve or maintain the desired ratio(s) below the levels specified in (b) above. Once the ratio(s) is achieved, awards up to the specified levels shall then go to the groups in accordance with the ratio(s) set forth in (b) above. Additional vacancies above the levels set forth above shall be awarded in accordance with the proportion of 2 Pan Am to 1 National, as specified in the New Flying provisions.

(d) If there is a reduction in the number of Captain F/O and/or FEO positions on the B-727, such reduction shall be accomplished in the following manner: The allocation of displacements between the two groups shall be determined by the reverse order in which the respective groups achieved such positions by application of the New Flying provision, until the levels specified in (b) above are reached. Thereafter displacements shall be allocated in accordance with the ratio set forth in (b) above.

G. *Sale of B-747 or DC-10-30 prior to January 1, 1986.* In the event that, prior to January 1, 1986, the Company sells or otherwise withdraws from service any

B-747 or DC-10-30 aircraft in active service as of the effective date of this Award, and there remain in service fewer than 45 B-747's or 5 DC-10-30's (or in the event the DC-10-30 now being withheld from service is not in service at the time of a DC-10-30 sale, 4 DC-10-30's), the affected group(s) shall be entitled to the following:

1. If the total of Pan Am airmen in B-747 Captain, F/O or FEO positions falls below 396, 513, or 527, respectively, and/or

2. If the total of National airmen in DC-10-30 Captain, F/O or FEO positions falls below 34 (or in the event of the DC-10-30 now being withheld from service is not in service at the time of a DC-10-30 sale, 28),

the affected group shall be awarded Captain, F/O and/or FEO vacancies from the other group's positions on the other equipment up to the number by which the sale or withdrawal has reduced the affected group's positions; provided, however, that if there are insufficient positions over and above the numbers for the other group set forth in 1. and 2. to restore the reduction in the affected group's positions, the shortage shall be shared proportionally between the two groups, using for the proportions the figures listed above. Subsequent vacancies shall be awarded to maintain in proportion any deficiencies until the numbers set forth in 1. and 2. above are again reached.

This provision shall not operate retroactively to give rise to any entitlements based on the sale or holding out of service of any aircraft before the effective date of this Award. It only applies to the sale or holding out of service of aircraft taking place after the effective date of this Award.

The term "affected airman group" means the number by which the total number of airmen flying that type of

aircraft is reduced by the sale or withdrawal from service in question.

H. *Sale of L-1001 or DC-10-10 aircraft prior to January 1, 1986.* In the event that, prior to January 1, 1986, the Company sells or otherwise withdraws from service any L-1011 or DC-10-10 aircraft in active service as of the effective date of this Award, so that there remain in service fewer than 12 L-1011's or 11 DC-10-10's, the affected group(s) shall be entitled to the following:

1. If the total of Pan Am airmen in L-1011 Captain, F/O or FEO positions falls below 97, 114 and 108, respectively, and/or

2. The total of National airmen in DC-10-10 Captain, F/O or FEO positions falls below 76, 64 and 74, respectively,

the affected group shall be awarded Captain, F/O and/or FEO vacancies from the other group's positions on the other equipment up to the number by which the sale or withdrawal has reduced the affected group's positions; provided, however, that if there are insufficient positions over and above the numbers for the other group set forth in 1. and 2. to restore the reduction in the affected group's positions, the shortage shall be shared proportionally between the two groups, using for the proportions the figures listed above. Subsequent vacancies shall be

C. If there are vacancies for which no bids are received and assignments must be made by the Company, the vacancies shall be assigned by inverse order of seniority in accordance with the applicable provisions of the then current Working Agreements.

D. In the event a National Pilot does not have a seniority number sufficient to permit him to bid and hold a Pilot position, he shall, nonetheless, have a prior right

to a First Officer position in the most junior Pilot equipment until such time as he is furloughed in accordance with the provisions of this Award.

In the event a National Pilot on furlough is recalled to duty, he shall have a prior right to a First Officer position even though his seniority number is not sufficient to permit him to bid and hold such a position.

Subject to the foregoing, an airman on furlough, whose recall is anticipated due to quota calculations, shall be proffered system vacancies concurrent with active airmen and may execute his system seniority accordingly.

/s/ Lewis M. Gill
LEWIS M. GILL, Arbitrator

March 12, 1981

AFFIDAVIT

THE STATE OF TEXAS)
)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared Ira Stuart Chorush who under oath did state the following:

My name is Ira Stuart Chorush. I am over the age of twenty-one years and am fully competent to make this affidavit.

I received a Ph.D. degree in statistical genetics from Purdue University in 1970 and have spent the last sixteen years employed as a statistical consultant. Much of my work during that time has been devoted to statistical analysis of employment decisions. Further details of my education and employment history are available in Attachment 1 which is attached to this affidavit.

I have been retained by Jeffrey C. Londa of the law firm of Butler & Binton, who is representing a group of airplane pilots who are challenging the pilot seniority system which is based on the Gill arbitration award and which was adopted and implemented by Pan Am. It is my understanding that Mr. Londa and his clients claim that such system operates to the detriment of older pilots. I have conducted several analyses which are probative of this claim. The following is a correct description of my work in this matter. To the best of my knowledge and belief, the analyses contained herein have been conducted according to generally accepted principles of statistics.

The data used to conduct this analysis are a listing of airplane pilots employed by Pan Am ordered by date of hire. This date may be the date hired by either Pan Am or National Airlines, depending upon which predecessor airline the airman worked for. In addition, the date of

birth of each airman and his pilot seniority number by virtue of the Gill award are used. A listing of the data used is attached to this affidavit as Attachment 2.*

Of primary interest in the section of the list where airmen have been assigned seniority numbers that are not consistent with their date of hire. These anomalies occur from position 1035 on the list (page 14 of Attachment 2, airman W. C. Swift) to position 2096 (page 30 of Attachment 2, airman R. B. Southard). Within these positions it is true that the more recently hired airmen were never assigned pilot seniority numbers that would make them less senior than they would have been had date of hire been used as the sole basis for pilot seniority. Indeed, in many cases, pilot seniority is substantially greater for more recently hired pilots.

As an ilustration, consider page 25 of Attachment 2. Airman W. H. Sanford would have been pilot number 1843 if length of service had been used. Instead, he is pilot number 2083. In contrast, Airman R. D. Sellars would have been pilot number 1855 if length of service were the criterion; instead, he is pilot number 1142. Thus, Sellars is 941 positions above Sanford on the seniority list despite having less service with his carrier.

It is likewise possible to examine the effects of the Gill award, as adopted and implemented by Pan Am, upon older pilots. Airman Sanford was born in 1937 while Airman Sellars was born in 1944. Thus, the older airman, Sanford, lost 240 positions in seniority vis-a-vis his length of service (1843 to 2083) while the younger Sellars gained 713 positions (1855 to 1142).

It is my purpose to examine whether the inversions in the seniority list that were the result of the Gill award, as adopted and implemented by Pan Am, seemed to result in a systematic deleterious effect upon older airmen. For this purpose, I defined airmen born before 1940 as

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* NOTE: Attachment 2 is set forth in Joint Appendix at 303-335.

older, while airmen born in 1940 or later were younger. This would make older airmen 40 years old or more at the time of the merger of National Airlines and Pan Am, while younger airmen were under 40. The actual pilot seniority number and the length of service seniority number were compared for each airman, in the area of the seniority list where inversions occur, and the difference between the two was calculated. In all, 267 airmen gained seniority positions as a result of the Gill award, as adopted and implemented by Pan Am, while 916 airmen lost seniority. The first question that might be asked is whether older and younger pilots fared similarly under Pan Am's pilot seniority system which is based on the Gill award.

TABLE 1

	Older Pilots	Younger Pilots
Airman gained seniority	93 *	174 *
Airman lost seniority	779 **	137 **

Chi-square = 269

* All of these airmen worked for National before the National/Pan Am merger.

** All of these airmen worked for Pan Am before the National/Pan Am merger.

Table 1, above, shows that 174 younger pilots fared better under Pan Am's system which is based on the Gill award while 137 fared worse. Conversely, only 93 older pilots gained under such system while 779 lost seniority. Thus, 55.9% of the younger airmen benefitted, while only 10.7% of the older airmen did.

The above data was subjected to a chi-square test to determine whether statistically significant discrepancy existed. A chi-square value of 269 was obtained which has a probability of less than one in one million of occurring by chance. The conclusion is that it is exceedingly unlikely that the phenomenon arises by chance; younger airmen fared substantially better than older airmen under the Gill award.

A second question that should be asked is whether the average improvement in younger airmen's seniority is significantly greater than zero; conversely, whether the decline in older airmen's seniority is likewise greater than zero. It has already been stated that 174 younger airmen gained seniority while 137 lost seniority. For each airman, the number of positions gained or lost was calculated. The mean (average) change in seniority was computed with gains in seniority assigned a plus (+) sign and losses a minus (—) sign. In addition, the standard deviation of the mean was calculated. Results are shown in Table 2.

TABLE 2

Mean Gain in Seniority for Younger Airmen

Average number of ranks increase	167.045
Standard deviation of mean	17.380
t	9.611

The average younger airman advanced more than 167 ranks in the seniority list as a result of Pan Am's system which is based on the Gill award. The standard deviation was 17.380 which leads to a t value of 9.611. The probability of obtaining so high a t value by chance is less than one in one million.

With the number of airmen involved in this analysis, the t statistic takes on many of the characteristics associated with the normal distribution. Thus, the t value of 9.611 has approximately the same meaning as a discrepancy of 9.611 standard deviations between zero, the hypothesized value and 167, the actual number of ranks advanced.

It should therefore not be too surprising that the result for older airmen is opposite and likewise highly significant.

TABLE 3

Mean loss in seniority for Older Airmen

Average Number of ranks decrease	—59.455
Standard deviation of mean	8.238
t	7.218

As shown in Table 3, the average older airman lost more than 59 positions in the seniority list. With a standard deviation of 8.238, a t value of —7.218 was obtained. This has a probability of occurring by chance of less than one in one hundred thousand. It is therefore extremely unlikely that the average 59 positions lost represent a random event.

In summary then, the effects of Pan Am's seniority system which is based on the Gill award have been examined relative to age. It can be concluded that the results emphatically indicate that Pan Am's seniority system which is based on the Gill award has acted and acts to the detriment of older airmen (i.e., airmen over 40 years of age).

/s/ Ira Stuart Chorush
IRA STUART CHORUSH

SUBSCRIBED AND SWORN TO BEFORE ME by the said Ira Stuart Chorush on this the 14th day of July, 1986, to certify my hand and seal of office.

/s/ Nancy L. Dean
Notary Public in and for the
State of TEXAS

My Commission Expires:
NANCY L. DEAN
Notary Public, State of Texas
My Commission Expires May 16, 1987
Bonded by Lovett Agency, Lawyers Surety Corp.

JCL/PAPF3/3

IRA STUART CHORUSH, Ph.D.

Education

Ph.D., Statistical Genetics, Purdue University, West Lafayette, Indiana, 1970

M.Sc., Statistical Genetics, Purdue University, West Lafayette, Indiana, 1968

B.Sc., Mathematics and Genetics, McGill University, Montreal, P.O. Canada, 1965

Consulting Experience

Fourteen years' consulting experience

Pertinent Experience

Consultant, St. Joseph's Hospital. Aided hospital in planning for future services by forecasting demands for different specialized treatments.

Consultant, Major metropolitan newspaper. Worked with large metropolitan newspaper to establish most cost-effective delivery system of product. In addition, developed forecasting system to predict operational variables of concern to the newspaper.

Technical Coordinator, Federal Reserve Bank of Dallas. Worked with the Federal Reserve Bank and with the eight major Dallas-Fort Worth commercial banks to determine, by computer simulation, the probable impact on each bank of the establishment of a Regional Check Processing Center in the area.

Technical Coordinator, National candy manufacturer. Designed and helped implement an inventory control, production scheduling and standard cost system.

Senior Consultant, United Virginia Bankshares. Established optimum check clearing methodology for

bank holding company and developed model to evaluate clearing alternatives.

In addition, general consulting services have been furnished on behalf of the following organizations:

American National Bank—Chicago
Bank of the Southwest
Baker & Botts
Baylor College of Medicine
City of Dallas, Texas
City of Denton, Texas
City of Garland, Texas
Citicorp
Dallas-Fort Worth Clearinghouse Association
First National Bank of Atlanta
First National Bank of Dallas
First National Bank of Fort Worth
Friendswood Development Corporation
Fulbright & Jaworski
Houston Lighting & Power
IBM
Lewis & Coker, Inc.
Mitsubishi, Ltd.
Morton Southwest
Rapides Packing Company
Texas Commerce Bank
Texas Instruments
TRW/Mission
Vinson & Elkins

EEO Consulting Experience

Prudential Insurance Company. Development employment model in conjunction with other analyses to determine whether discrimination against Blacks had occurred. Testified as expert witness.

National Supply Company. Developed analyses to determine whether discrimination against females has occurred. Testified as expert witness.

Fluor Engineers and Constructors. Development analyses to determine whether discrimination based on national origin had occurred in the hiring process. Testified as expert witness.

In addition, EEO consulting services have been furnished on behalf of the following organizations:

American Cast Iron Pipe Company
Aramco Services Corporation
Arthur Brothers
Bethlehem Steel
Central Freight Lines
Champion Paper Company
Chemetron Corporation
Cities Service Company
Continental Trailways
Curtin Matheson Scientific
Drilco
Federal Reserve Bank of Dallas
Houston Chronicle
Houston Lighting & Power
Houston Police Department
IBM
J. P. Stevens
Lockheed
Memorial Hospital System
Petrotex
Republic Steel
Rockwell
Shell Oil
Southern Pacific Railroad
State Farm
Swift Packing Company
Texas Commerce Bank
United Gas Pipeline
U.S. Department of Justice
Weaver Oil & Gas
Western Electric

Wilson Industries
Zapata

Served as expert counsel to the following law firms:

Baker & Botts (Houston)
Fulbright & Jaworski (Houston)
Butler, Binion, Rice, Cook & Knapp (Houston)
Andrews, Kurth, Campbell & Jones (Houston)
Hutcheson & Grundy (Houston)
Hewett, Johnson, Swanson & Barbee (Dallas)
Thomas, Taliaferro, Burr, Foreman & Murray (Birmingham)

Publications and Awards

Author of six papers dealing with statistical genetics.
Awarded membership in Sigma Xi.

AFFIDAVIT

DISTRICT OF COLUMBIA) s.s.

BEFORE ME, the undersigned authority, on this day personally appeared Mr. Harold M. Gay, Jr., who under oath did state as follows:

1. My name is Harold M. Gay, Jr. I am over the age of twenty-one years and fully competent to make this affidavit.

2. I am presently 44 years of age. I was born on January 31, 1942. I have been employed by Pan American World Airways, Inc. ("Pan Am") as a pilot since December 20, 1965. I am a member and an officer of the Air Line Pilots Association ("ALPA"), currently serving as Chairman, Air Line Pilots Association, Pan American World Airways, Inc. ("ALPA-PAA"), Local Executive Council #6.

3. I have read Plaintiffs' Complaint dated March 7, 1984. I am familiar with the pilot seniority system referred to in the Complaint, with events concerning its construction and implementation, and particularly with its subsequent impact on all pilots in the employ of Pan Am.

4. Before the merger of Pan Am and National, Pan Am's fleet consisted of the Boeing 747 ("B-747"), Lockheed 1011 ("L-1011") and Boeing 727 ("B-727"). National's fleet consisted of the DC-10 and B-727. Under the Gill Award, the terms of which Pan Am adopted as its pilot seniority system, the pre-merger assignments of Pan Am airmen on the B-747 and L-1011 and former National airmen on the DC-10 were to be preserved until January 1, 1986. A "fence" was thus constructed which prevented pre-merger Pan Am airmen from obtaining assignments on the DC-10 and pre-merger National airmen from obtaining assignments on the B-747 and

L-1011. The "fence" was constructed so that during the pre-1986 'freeze" period, the members of the respective pilot groups would receive the same intra-group promotions and demotions as they would have absent the merger. Under the terms of the pilot seniority system, this "fence" would be crossed and the "freeze" ended only if Pan Am were to sell or withdraw from service aircraft which had belonged solely to either Pan Am of National before the merger (i.e., the B-747, L-1011 or DC-10). Pan Am's sale or withdrawal of any of the above aircraft would trigger certain "conditions and restrictions" contained in the Gill Award designed to permit crossing of the "fence" in the event of such sale or withdrawal. If before January 1, 1986, Pan Am sold or withdrew from service *none* of the above-listed aircraft, the flight operations of Pan Am and National would be maintained as before the merger with respect to those aircraft (i.e., completely separate).

5. In or about September 1981, Pan Am posted the integrated pilot seniority list, but stated that such list was "tentative" and that pilots could submit protests to Pan Am concerning their seniority position for an unspecified period following the posting of the tentative list. The "final" integrated pilot seniority list, based on Pan Am's adoption of the Gill Award, was issued in or about March 1982.

6. Between the time of its posting of the "final" integrated pilot seniority list and early February 1983, Pan Am did not sell or withdraw from service any B-747, L-1011 or DC-10 aircraft. Hence, Pan Am's and National's flight operations remained essentially separate. Even though the B-727 operations of Pan Am and National were nominally "integrated," this had no practical impact on Pan Am's business because (1) Pan Am had owned B-727 aircraft before the merger and thus reaped no unique or significant benefits in gaining access to B-727's formerly owned by National; and (2) crossover

of Pan Am and National airmen on the B-727 was limited in practice by the Gill Award. See paragraph 10(c), *infra.*

7. In early 1983, Pan Am commenced the first of a series of transactions involving the acquisition, sale or withdrawal from service of a number of its aircraft. These transactions have triggered "conditions and restrictions" under the Pan Am pilot seniority system, some of which continue to affect the allocation of opportunities and prerogatives to pilots in the system. These "conditions and restrictions" have since operated in tandem with, and have exacerbated the discriminatory impact of, the seniority list integrated by ratio. To wit, the "conditions and restrictions" have resulted in extensive crossovers of young former National airmen to equipment formerly flown only by Pan Am airmen, denied older Pan Am pilots, including Plaintiffs in this action, with longer service and flying experience the same opportunities, and thereby had an adverse impact on Pan Am pilots over the age of 40 throughout the seniority list.

8. On March 28, 1983, Pan Am issued an "award" reassigning pilots under its pilot seniority system. These reassignments were the first governed by the crossover "conditions and restrictions" discussed above. As a direct result of the application of these "conditions and restrictions" to the operation of the integrated seniority list, the reassignments of March 28, 1983, had the following adverse impact on senior Pan Am pilots over the age of 40 with more flying experience, including Plaintiffs in this action:

(a) Approximately one hundred (100) former National pilots under the age of 40 were given Captain or First Officer positions superior to those of several hundred Pan Am pilots over the age of 40 with greater actual seniority (*i.e.*, longer service or earlier date of hire).

(b) Of those one hundred (100) former National pilots under the age of 40, approximately sixteen (16) were given First Officer positions on wide-bodied aircraft, and approximately six (6) were given Captain positions superior to those of several hundred Pan Am pilots over the age of 40 with greater actual seniority.

(c) Three (3) Pan Am pilots (Richard Jarboe, Clifford Cool and Richard Paul), who were all over the age of 40 and had over 16 years of credited experience as of March 28, 1983, lost their jobs on June 15, 1983, pursuant to the terms of the pilot seniority system. Over one hundred (100) former National pilots under the age of 40 and with less actual seniority than Messrs. Jarboe, Cool and Paul remained employed by Pan Am. See paragraph 10(e), *infra*.

(d) In hundreds of other instances, Pan Am pilots over the age of 40 received assignments inferior to those of former National pilots who were younger and had less actual seniority than their Pan Am counterparts.

9. Pan Am has since issued a number of awards reassigning pilots in the Pan Am pilot seniority system. Each of these awards has been heavily affected by the above-described "conditions and restrictions" in the Gill Award, in addition to the operation of the integrated pilot seniority list. Each of the awards has had an adverse impact on senior pilots over the age of 40, including Plaintiffs, which impact has been similar to, if not greater than, that caused by the Award of March 28, 1983. Each of the awards has been substantially influenced by the "conditions and restrictions" in the Gill Award.

10. The "conditions and restrictions" in the Gill Award have disadvantaged Pan Am pilots, including

Plaintiffs, who are older and have longer service and flying experience than those benefitted. For example:

(a) *No system flush* (p. 6)—had the effect of keeping Pan Am and National pilots in their premerger positions between 1981 and 1983, thus allowing younger National pilots to hold positions and receive salaries to which older Pan Am pilots with longer service were entitled.

(b) *Restrictions on 747 and DC-10-30 Captain vacancies* (p. 6)—was to take effect as of January 1, 1986, but Pan Am is contending that it is not applicable; issue is in arbitration.

(c) *Cross-bidding* (p. 7)—allowed former National pilots to retain higher-paying Captain and First Officer positions while older and more senior Pan Am pilots remained in or in some cases were even demoted to lesser-paying Flight Engineer positions.

(d) *New flying* (p. 7)—provided that if Pan Am were to increase its utilization of any aircraft before January 1, 1986, new assignments on such aircraft would not be distributed by actual seniority (i.e., by length of service or date of hire), nor even by the integrated seniority list, but rather by a ratio of two Pan Am airmen to one National airman. This provision thus had the effect of incorporating into the pilot seniority system another ratio, even more age discriminatory and less seniority-based than the one used in the Gill Award to merge the two lists. Since Pan Am pilots outnumber National pilots by more than three to one, and Pan Am pilots as a group are older and more senior, this two-to-one ratio distributed "new flying" assignments in a pattern which disadvantaged older Pan Am pilots with longer service.

(e) *Furloughs* (p. 7)—provided that furloughs (i.e., layoffs) before January 1, 1986, would not be governed by actual credited seniority (i.e., with pilots with lesser service or more recent dates of hire furloughed first) nor even by the seniority list (i.e., with pilots at the bottom of the list furloughed first), but rather by a formula whereby one Pan Am airman would be furloughed for each National airman furloughed. This provision was used to effectuate the furlough discussed in paragraph 8(c) above, which had an adverse impact on these pilots over age 40. Moreover, an accompanying provision governing recalls of furloughed pilots has also been interpreted by Pan Am so as to disadvantage pilots over age 40.

(f) *Protection of flying until January 1, 1986* (p. 8)—

(1) *Protection of 747, L-1011 and DC-10 flying*—had the effect of barring older, more senior Pan Am pilots from receiving assignments on aircraft formerly owned by National.

(2) *Protection of 727 flying* (p. 9)—required older, more senior Pan Am pilots to move to Berlin, West Germany, in order to receive B-727 Captain positions, while younger, less senior National pilots were able to remain in the United States and hold such positions. This provision also allocated other positions on the B-727 by ratios which had an adverse impact on senior Pan Am pilots over the age of 40. As interpreted by Pan Am, this provision was extended to deny positions on newly acquired B-727 and A-300 aircraft to older, more senior Pan Am pilots.

(g) *Sale of B-747 or DC-10-30 prior to January 1, 1986*—had same effect as (f) (1).

(h) *Sale of L-1011 or DC-10-10 aircraft prior to January 1, 1986*—had same effect as (f) (1).

(i) *Recapture provisions*—took effect as of January 1, 1986, and will allow younger, less senior National pilots to regain positions which they received prior to January 1, 1986, and which older, more senior Pan Am pilots would otherwise be able to claim in the absence of this provision.

11. Pan Am pilots are put into groups called "base station categories" for the purpose of determining working conditions such as the following: monthly lines of flying; blank lines of flying (a schedule of days on and off); vacations; open time board (additional flying time); and temporary assignments. The composition of, and treatment of pilots under, each "base station category" is derived entirely from the composition of, and treatment of each pilot under, the main pilot seniority list (referred to as the "system" seniority list). Because of the composition of the system seniority list, as set forth by the Gill Award and adopted and implemented by Pan Am, Pan Am pilots over the age of 40 have suffered monetary and other actual damage as a result of the above-described "base station categories."

12. Since its adoption by Pan Am, the Gill Award has been incorporated into and made a part of the "Agreement Between Pan American World Airways, Inc. and Its Airline Pilots As Represented by the Air Line Pilots Association, International."

13. I and similarly situated pilots over age 40 have suffered severe financial damage as a result of the adop-

tion and implementation of the Pan Am pilot seniority list.

/s/ Harold M. Gay, Jr.
HAROLD M. GAY, JR.

SUBSCRIBED AND SWORN TO BEFORE ME by the said Harold M. Gay, Jr., on this the —th day of July, 1986, to certify my hand and seal of office.

/s/ Margaret Mae Gardiner
Notary Public in and for the
District of Columbia

My Commission Expires:

May 14, 1990

AFFIDAVIT

DISTRICT OF COLUMBIA) s.s.

BEFORE ME, the undersigned authority, on this day personally appeared Mr. Marvin Osburn, who under oath did state as follows:

1. My name is Marvin Osburn. I am over the age of twenty-one years and fully competent to make this affidavit.

2. I am presently 52 years of age. I was born on July 5, 1934. I have been employed by Pan American World Airways, Inc. ("Pan Am") as a pilot since April 26, 1967. I am a member of the Flight Engineers International Association, Pan Am Chapter ("FEIA-PAA") and am currently a Pre-Merger Pan American Flight Engineer Representative on the Gill Award Disputes Resolution Committee representing flight engineers and pilot-flight engineers who were employed by Pan Am before the merger of Pan Am and National Airlines, Inc. ("National"). I have served in this position since June 6, 1984.

3. I have read Plaintiffs' Complaint dated March 7, 1984. I am familiar with the pilot seniority system referred to in the Complaint and with events concerning its construction and implementation.

4. Pan Am merged with National in 1980. Defendants ALPA and FEIA, through their respective chapters (collectively "Defendant Unions"), represented Pan Am and National pilots and flight engineers. Defendant Unions submitted to an arbitrator, Mr. Lewis M. Gill, the issue of how the Pan Am and National pilot and flight engineer seniority lists should be merged.

5. During the Gill arbitration, I was Support Statistician for the FEIA-PAA Merger Committee, and assisted Mr. Richard Phenneger in preparing FEIA-PAA's

presentation to Arbitrator Gill. FEIA-PAA was representing the interests of 1) the Pan Am professional flight engineers (*i.e.*, who do not possess pilot bid rights) as to the integration of the flight engineer lists, and 2) more important to this proceeding, the Pan Am pilot-flight engineers ("PFEs") (*i.e.*, those Pan Am flight engineers who are licensed and certificated to hold pilot positions and who are also certificated to hold flight engineer positions) as to the integration of the pilot system.

6. ALPA and FEIA representatives of the pre-merger Pan Am pilots proposed to Arbitrator Gill that the pilot seniority lists of Pan Am and National be integrated according to the "dates of hire" or "lengths of service" of airmen on the two lists. ALPA representatives of the pre-merger National pilots proposed that the pilot seniority lists be integrated by a ratio, such that individual members of the National pilot group would be slotted into the larger and more senior Pan Am pilot list based on a numerical formula. The National pilots further proposed that if a "date of hire" or "length of service" method of integration were adopted, the operation of such a list should be limited by "conditions and restrictions" which would benefit the former National pilots by reserving positions for them to which they would otherwise not be assigned under a date of hire/length of service list. The pre-merger National pilots were generally younger than the pre-merger Pan Am pilots. The "conditions and restrictions" which the pre-merger National pilots proposed were thus on their face designed to benefit younger National pilots *vis-a-vis* the older and senior Pan Am pilots.

7. Attorneys representing Pan Am were present at all of the recorded Gill arbitration hearings as observers.

8. The Gill Award was issued on March 12, 1981. It incorporated a "ratio" method of integrating approximately one-half of the pilots (1053 or 49%) on the prior

Pan Am and National pilot seniority lists, thereby benefitting pre-merger National pilots as a group and disadvantaging hundreds of pre-merger Pan Am, *i.e.*, older and more senior, pilots. At the same time, the Gill Award also adopted the "conditions and restrictions" which had been proposed by the pre-merger National pilots for use if a date of hire/length of service method of integration was used.

9. Pan Am and all of the parties to the Gill arbitration were made aware that the "conditions and restrictions" as eventually incorporated into the Gill Award would work to the benefit of pre-merger National pilots (*i.e.*, younger and with less service and flying experience) and the detriment of pre-merger Pan Am pilots (*i.e.*, older and with more service and flying experience).

10. Pan Am could have foreseen that the adoption and implementation of the Pan Am pilot seniority system would save Pan Am millions of dollars in airman training costs. Each time an airman is reassigned from one aircraft to another or one seat to another on one aircraft, he must be retrained. This training is very costly. Any seniority system which causes a large group of airmen to stay in positions for a long period of time will cause an airline's airman retraining costs to be reduced. It could have been foreseen that by imposing "conditions and restrictions" on the advancement of senior Pan Am airmen over the age of 40 (*e.g.*, restricting movement from one aircraft to another or one seat to another aircraft), the Pan Am pilot seniority system would cause a large group of airmen to stay in a position for a long period of time, thereby reducing Pan Am's airman training costs.

11. Since its adoption by Pan Am, the Gill Award has been incorporated into and made a part of the "Agreement Between Pan American World Airways, Inc. and

Its Flight Engineers As Represented by the Flight Engineers International Association."

/s/ Marvin Osburn
MARVIN OSBURN

SUBSCRIBED AND SWORN TO BEFORE ME by the said Marvin Osburn, on this the —— day of ———, 1986, to certify my hand and seal of office.

/s/ Margaret Mae Gardiner
Notary Public in and for the
District of Columbia

My Commission Expires:
May 14, 1990

AFFIDAVIT

DISTRICT OF COLUMBIA ss:

BEFORE ME, the undersigned authority, on this day personally appeared Kevin Flynn, Esq., who under oath did state as follows:

1. My name is Kevin Flynn. I am over the age of twenty-one years and fully competent to make this affidavit.

2. I am an associate with the law firm of Shaw, Pittman, Potts & Trowbridge, 1800 M Street, N.W., Washington, D.C. 20036. I am a member of the District of Columbia Bar and have been admitted to the bar of this Court *pro hac vice.*

3. Exhibit A to this Affidavit is a true and complete copy of the Labor Protective Provisions ("LPPs") imposed by the Civil Aeronautics Board ("CAB") in CAB Orders 79-12-163/164/165, in which it approved the acquisition by Pan American World Airways, Inc. ("Pan Am") of National Airlines, Inc. ("National").

4. Section 3 of the LPPs states in its entirety:

> Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.

5. Section 13(a) of the LPPs states in its entirety, with emphasis added:

> Section 13(a). In the event that any dispute or controversy (except as to matters arising under sec-

tion 9) arises with respect to the protections provided herein, which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator selected from a panel of seven names furnished by the National Mediation Board for consideration and determination. The parties shall select the arbitrator from such panel by alternatively striking names until only one remains, and he shall serve as arbitrator. *Expedited hearings and decisions will be expected, and a decision shall be rendered within 90 days after the controversy arises, unless an extension of time is mutually agreeable to all parties.* The salary and expenses of the arbitrator shall be borne equally by the carrier and (i) the organization or organizations representing the employee or employees, or (ii) if unrepresented, the employee or employees or group or groups of employees. The decision of the arbitrator shall be final and binding on the parties.

/s/ Kevin Flynn
KEVIN FLYNN

SUBSCRIBED AND SWORN TO BEFORE ME by the said Kevin Flynn, on this the 18th day of July, 1986, to certify my hand and seal of office.

/s/ Margaret Mae Gardiner
Notary Public on and for
the District of Columbia

My Commission Expires:

May 14, 1990

AFFIDAVIT

STATE OF ———— s.s.

COUNTY OF————

BEFORE ME, the undersigned authority, on this day personally appeared Mr. James Bailey, who under oath did state as follows:

1. My name is James Bailey. I am over the age of twenty-one years and fully competent to make this affidavit.

2. I am presently 53 years of age. I was born on March 5, 1933. I have been employed by Pan American World Airways, Inc. ("Pan Am") since May 31, 1966. I am a member of the Air Line Pilots Association ("ALPA").

3. I have read Plaintiffs' Complaint dated March 7, 1984. I am familiar with the pilot seniority system referred to in the Complaint, with events concerning its construction and implementation, and particularly with its subsequent impact on all pilots in the employ of Pan Am.

4. In the spring of 1981, shortly after the Gill Award was issued on March 12, I visited the office of the Chief Pilot of Pan Am on several occasions within a short period of time for the purpose of arranging my flying schedule so as to accommodate frequent visits to my sister in New York, who was terminally ill. During this time, I had frequent contact with Mr. William Erkies, then-Vice President of Flight Operations for Pan Am. Mr. Erkies was to be responsible for the operational details of manning Pan Am flights based on the integrated Pan Am-National seniority list. During one lengthy conversation, I strongly recommended to him that Pan Am not adopt the Gill Award because if it were implemented,

it would have an illegal impact on older pilots. Mr. Erkies replied that he was aware that this problem existed, that he did not feel that the Gill Award was fair, and that he would look into the matter. This conversation was held well in advance of late May 1981, which I understand is when Pan Am officially adopted the Gill Award.

/s/ _____
JAMES BAILEY

SUBSCRIBED AND SWORN TO BEFORE ME by the said James Bailey, on this the —— day of ————, 1986, to certify my hand and seal of office.

/s/ _____
Notary Public in and for the
State of

My Commission Expires:

_____

AFFIDAVIT

STATE OF CALIFORNIA)
) s.s.
COUNTY OF CONTRA COSTA)

BEFORE ME, the undersigned authority, on this day personally appeared Mr. Samuel Woolsey, who under oath did state as follows:

1. My name is Samuel Woolsey. I am over the age of twenty-one years and fully competent to make this affidavit.

2. I am presently 53 years of age. I was born on September 16, 1932. I was employed by Pan American World Airways, Inc. ("Pan Am") as a pilot from June 20, 1966 to February 12, 1986. I am currently employed by United Airlines, Inc. as a pilot.

3. On December 12, 1984, I wrote a letter to Mr. C. Edward Acker, Chairman of the board of Pan Am, concerning Pan Am's implementation of the Gill Award. Mr. Acker replied to me by letter dated January 4, 1985. See Exhibit A. Mr. Martin Shugrue, Vice Chairman of Pan Am, also replied to me by letter dated January 17, 1985. See Exhibit B.

/s/ Samuel D. Woolsey
SAMUEL D. WOOLSEY

SUBSCRIBED AND SWORN TO BEFORE ME by the said Samuel Woolsey on this the 16th day of July, 1986, to certify my hand and seal of office.

/s/ _____
Notary Public in and for the
State of California

My Commission Expires:
March 25, 1988

C. Edward Acker
Chairman of the Board

January 4, 1985

Mr. S. Woolsey
14 Creekwood Court
Danville, CA 94526

Dear Mr. Woolsey:

Your letter of December 12, 1984 is appreciated. It is appreciated because it is far better that an employee who believes his Company is perpetuating an injury to him, communicates that belief to the Company so the facts may be explored in a rational manner.

As you state in your letter, the Gill Award was presented to the Company in 1980 when we were asked to accept the Award and thereby become a party to it.

The sole aim of the Company was to determine whether or not the Award caused any undue hardship on our operation. We did not then nor do we now have any desire to intrude on seniority questions beyond the scope of their administrative practicalities.

Our view at the time was that, although highly complex, the Award was administratively practical. The alternative was another protracted and costly arbitration.

It was our understanding that the parties to the Award had the opportunity for a full and fair hearing before the arbitrator.

As to your allegations that Pan Am has consciously and selfishly distorted the Gill Award, nothing could be further from the truth.

You have obviously studied the Gill Award and are therefore familiar with Article III; the Resolution of Disputes. You then must also be familiar with the fact

that Article III of the Gill Award established a Disputes Resolution Committee composed of airmen representatives and requires that in the event of a dispute among the Committee concerning the interpretation or application of the Award, such dispute must be resolved through arbitration.

Only after that process has been completed may the Company arbitrate questions of interpretation or application of the Award.

At this point I would like to advise you of some facts about which you may not be aware. On each and every occasion of a Proffer since the implementation of the Gill Award and prior to the Award date of each such Proffer, the Company has requested meetings with the Dispute Resolution Committee although there is no requirement under the Gill Award to do so. Why have we sought these meetings, even to the point of providing transportation and paying for lost patterns for the Committee? In order to review the Proffer with the Committee and to seek the Committee's guidance in applying the Gill Award to the Proffer. Indeed, we have *implored* the Disputes Resolution Committee to arbitrate disputes regarding the application of the Gill Award *prior* to the Award of every Proffer so it would not become necessary for the Company to get into the business of interpreting the Gill Award! And on every occasion the Committee has declined to carry out its obligations prior to the Company being compelled to make its own best faith interpretations.

Pan Am does not *want* to interpret the Gill Award Mr. Woolsey. We believe that Article III of the Award places that obligation on the Dispute Resolution Committee. But in the absence of any timely action on the part of the Committee, Pan Am is compelled to render its own decisions (all of which to date have been upheld in subsequent arbitrations).

The failure of the Disputes Resolution Committee to carry out its obligations under the Award has perfectly predictable results—letters such as yours charging the Company with deliberately distorting the Gill Award for its own self interests.

The Company has not had nor does it now have any desire or motivation to interpret the Gill Award. The record on this is clear and the facts undeniable: The Company has consistently requested the Dispute Resolution Committee to carry out its responsibilities of resolving disputes of interpretation and application of the Gill Award. They have consistently failed to do that. They have transformed their responsibilities under the Gill Award into an unfair burden on the Company.

I would therefore suggest that you contact your representatives and advise them that you desire to have the Gill Award applied without Company interpretations—that ability is and has always been within their power.

In closing I wish to again thank you for giving me the opportunity to provide you with the facts and hopefully dispell any idea that Pan Am is or has attempted to utilize the Gill Award to improperly restructure seniority for its own purpose.

Sincerely yours,

C. EDWARD ACKER

cc: M. R. Shugrue
C. R. Grebey
D. E. Pritchett
W. P. Kimmins

PAN AM

Martin R. Shugrue, Jr.
Vice Chairman

January 17, 1985

Mr. S. Woolsey
14 Creekwood Court
Danville, CA 94526

Dear Mr. Woolsey:

I am in receipt of your letter dated December 12, 1984 copies of which, identical in content, were addressed to Mr. Acker, me and Mr. Kimmins.

By letter dated January 4, 1985, Mr. Acker responded to the content of your letter. That response was reviewed with me and I concur with Mr. Acker's thoughts.

Thank you for taking the time to express your concerns and affording us the opportunity to present you with the facts.

Sincerely,

/s/ Martin R. Shugrue, Jr.
MARTIN R. SHUGRUE, Jr.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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84 Civ. 1651 (RWS)

JOHN C. COOK, *et al.*,
Plaintiffs,

—against—

PAN AMERICAN WORLD AIRWAYS, INC., AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AIR LINE PILOTS ASSOCIATION, PAN AM CHAPTER, FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, PAN AM CHAPTER,
Defendants.

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85 Civ. 2371 (RWS)

F. J. LEWANDOWSKI, *et al.*,
Plaintiffs,

—against—

PAN AMERICAN WORLD AIRWAYS, INC., AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AIR LINE PILOTS ASSOCIATION, PAN AM CHAPTER, FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, PAN AM CHAPTER,
Defendants.

OPINION

APPEARANCES:

HUTCHESON & GRUNDY, ESQS.
Attorneys for Plaintiffs
3300 Citicorp Center
1200 Smith Street
Houston, Texas 77002
By: JEFFREY C. LONDA, ESQ.
Of Counsel

SHAW, PITTMAN, POTTS & TROWBRIDGE, ESQS.
Attorneys for Plaintiffs
2300 N Street, N.W.
Washington, D.C. 20037
By: ROBERT E. COHN, ESQ.
KEVIN FLYNN, ESQ.
Of Counsel

JEFFREY M. BERNBACH, ESQ.
Attorney for Plaintiffs
521 Fifth Avenue
New York, New York 10175

PAN AMERICAN WORLD AIRWAYS, INC.
Legal Department—Room 918
Attorneys for Defendant
Pan American World Airways, Inc.
200 Park Avenue
New York, New York 10166
By: RICHARD SCHOOLMAN, ESQ.
Of Counsel

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
Attorney for Defendant
Air Lines Pilots Association, International
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
By: JONATHAN A. COHN, ESQ.
Of Counsel

SHAPIRO, SHIFF, BEILLY, ROSENBERG & FOX, ESQS.
Attorneys for Defendant
Air Line Pilots Association
225 Broadway
New York, New York 10007
By: SIDNEY FOX, ESQ.
GARY GREEN, ESQ.
Of Counsel

O'DONNELL & SCHWARTZ, ESQS.
Attorneys for Defendant
Flight Engineers International Association
285 Madison Avenue
New York, New York 10017
By: ASHER SCHWARTZ, ESQ.
DAVID ROSEN, ESQ.
Of Counsel

SWEET, D. J.

In these cases brought under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 623-31, defendant Pan American World Airways ("Pan Am") and the defendant labor unions, the Air Line Pilots Association ("ALPA"), the ALPA Master Executive Council for the Pan Am Pilots ("ALPA-PAA"), the Flight Engineers' International Association ("FEIA"), and the FEIA Pan Am Chapter ("FEIA-PAA") (collectively the "Unions"), have moved for summary judgment in their favor. John C. Cook ("Cook"), as the representative of pilots over age 40 employed by Pan Am prior to Pan Am's merger with National Airlines ("National"), challenges as a violation of ADEA the adoption and implementation of a 1981 seniority system integrating the pilot and flight engineer lists of the two merged airlines. Pan Am and the Unions were signatories to the collective bargaining agreement that led to the adoption of the merged system. On the findings and conclusions set forth below, the motions are granted.

Prior Proceedings

Cook initiated this action on March 7, 1984, alleging that Pan Am and the Unions, by adopting and implementing a 1981 seniority list integrating the pilots and flight engineers of the two merged airlines, had violated the ADEA and New York Human Rights Law, N.Y. Exec.Law § 296, *et al.* (McKinney 1982 & Supp. 1984-85), and that the Unions had in addition violated the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (1982). The defendants moved this court, the Honorable Robert J. Ward presiding, to dismiss the complaint on the grounds that the federal claims were time-barred, that the pendent claim should be dismissed for lack of jurisdiction and that the complaint constituted an impermissible attack on a final order of the Civil Aeronautics Board ("CAB"). Judge Ward dismissed the complaint for lack of subject matter jurisdiction, finding that the action constituted an impermissible collateral attack on a final order of the CAB not appealed in accordance with the provisions of § 106 of the Federal Aviation Act, 49 U.S.C. § 1486(a).

On appeal, the Second Circuit affirmed in part, reversed in part, and remanded for further proceedings. It reversed the dismissal of the ADEA claims and remanded on the ground that plaintiffs are entitled to the *de novo* determination in the district court provided for by Congress in its enactment of ADEA. *Cook v. Pan American World Airways, Inc.*, 771 F.2d 635, 641 (2d Cir. 1985), *cert. denied*, 106 S.Ct. 895 (1986). It noted that this case is governed by § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), which insulates an employer or labor organization from liability for observing the terms of a "bona fide seniority system . . . which is not a subterfuge to evade the purposes" of the ADEA. *Cook*, 771 F.2d at 644. Among the circumstances to be considered with respect to the requirement that a seniority

system not be a "subterfuge" are the reasons advanced for the use of a ratio method in the middle of the list as well as the validity of plaintiffs' claim that defendants have engaged in "willful" discrimination. *Id.*

The Second Circuit affirmed the dismissal of the fair representation claim under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, as an impermissible collateral attack on the CAB's final order. Finally, it held that plaintiffs' claims were not time-barred since the alleged discriminatory violations were continuous, giving rise to claims on each occasion that the merged seniority list is applied to individual plaintiffs.

Since remand, discovery has gone forward, and has now been completed.

The findings and conclusions set forth below have been reached on the basis of over fifteen affidavits, eleven deposition transcripts, voluminous documentary evidence concerning the arbitration proceedings and oral argument presented by skilled counsel on August 7, 1986. While the conclusions to be drawn from the facts found below are in sharp conflict, the facts are not the subject of dispute.

Findings of Fact

In late 1979, the CAB approved the application of Pan Am to merge with National, conditioning that approval on the surviving carriers' acceptance of certain labor protective provisions. CAB Order 79-12-164 at 1. In particular, the CAB directed that "provisions shall be made for the integration of [the Pan Am and National] seniority lists in a fair and equitable manner," CAB Order 79-12-164 § 3, and that a dispute unresolved by the parties within twenty days "may be referred to any party to an arbitrator." *Id.* § 13(a).

On March 19, 1980, the Unions, the National Airlines Master Executive Council of ALPA ("ALPA-NA") and

the National Airlines Chapter of FEIA ("FEIA-NA") entered into an agreement establishing the procedures for integrating the Pan Am and National seniority lists. In part, the agreement provided that arbitration was "mandatory" if merger representatives were unable to agree within a limited time, *see* March 19, 1980 Agreement, ¶ 8(a), and that the lists were to be merged in a "fair and equitable" manner. § 8(f). The agreement designated Lewis M. Gill as arbitrator ("the Arbitrator"), ¶ 8(b), and provided that the Arbitrator's decision "shall be final and binding as to all flight deck operating members and shall be defended by the parties." ¶ 8(j). Because negotiation and mediation were unsuccessful, the question of how to integrate the airman seniority lists was submitted to arbitration. Beginning in September, 1980, the Arbitrator conducted formal proceedings, fully participated in by the parties to the arbitration—FEIA-PAA, FEIA-NA, ALPA-PAA and ALPA-NA. The record of these proceedings covers approximately 35 days of hearings and includes 4,700 transcript pages and hundreds of exhibits. Following the close of the hearings on January 14, 1981, the Arbitrator held two weeks of executive session with the union parties. After a series of informal meetings with the parties, the Arbitrator issued his final award on March 12, 1981 (the "Award").

Pan Am, which was not a party to the arbitration proceedings although its representatives attended all of the hearings, was not required to accept the Award. If it had not accepted the Award, it would have been required to submit the seniority integration dispute to an arbitration in which it would have been a party. That arbitration would have been binding on Pan Am.

Throughout the arbitration, the Pan Am pilots and flight engineers sought integration of the lists based on straight date of hire or length of service, arguing that

any inequities could be dealt with by using conditions and restrictions. *See* Gill Opinion, May 11, 1981, at 15. The Pan Am pilots vigorously opposed any ratio that would put any National pilots with shorter length of service ahead of the earlier hired and generally older Pan Am pilots.

According to the National pilots, a straight date of hire ("DOH") or length of service ("LOS") list would be inequitable since National was stronger financially and thus would have offered National airmen greater "expectancies." A DOH or LOS would place the later hired National pilots who brought active jobs to the merger below furloughed Pan Am pilots on the merged list. The National pilots proposed a ratio under which they would be put in positions on the list that would allow them to fulfill their pre-merger expectancies.

The Award

In the Award, the Arbitrator established two separate lists, one for the pilots and another for the flight-engineers. As the opinion issued in conjunction with the Award explains, the divergent nature of the respective bidding and bumping practices at each carrier necessitated the establishment of two separate seniority lists. Since 1963 Pan Am has hired its pilots directly to the initial position of flight-engineer. Subsequently, this practice led to the development of bidding rights by flight-engineers for pilot vacancies, and conversely, the right of pilots to bump down into flight-engineer positions. Similar cross-bidding and bumping practices never developed at National because it hired pilots directly into the first officer position, and employed non-pilots as flight-engineers. Thus, National's flight-engineers could never bid into pilot vacancies, and pilots could never bump down into flight-engineer positions. The Arbitrator preserved those two long-standing sets of bidding/bumping practices, noting that Pan Am "[w]ill continue

to have the cross-bidding and bumping rights vis-a-vis each other which they have had before" and that Pan Am's bidding practices should not be imposed on the National airmen.

With respect to the engineers' seniority list, the Arbitrator used a straight LOS/DOH method. With respect to the pilots' seniority lists, the Arbitrator integrated the Pan Am and National pilots into the top and bottom portions of the list in accordance with date-of-hire and length-of-service. The middle portion of the list challenged here, however, was integrated based upon a ratio method.[1] That method placed 3.25 Pan Am pilots into the list for each National pilot and encompassed seniority numbers 1289-2112 on the pre-merger Pan Am list and 241-496 on the National list. Thus at the middle of the pilots' list one National pilot with relatively less length of service seniority was inserted after about every four Pan Am pilots, who as a group had been hired earlier.

As the Arbitrator explained in his opinion, the complete DOH/LOS list advocated by the Pan Am airmen would have imposed substantial inequities on many National pilots. Specifically, National airmen hired after 1964 would be denied the prospects for advancement to larger aircraft that they could have expected absent the merger. Noting that Pan Am pilots would be subject to no comparable inequity as a result of the ratio, the Arbitrator concluded that a ratio was necessary to insure that the lists were merged in a fair and equitable manner, *i.e.*, that "the airmen on each airline be in a position to fill vacancies in positions for which they had reasonable expectations absent the merger, or positions reasonably comparable thereto or, at least, to achieve a fair balance in the extent to which they may fall short of

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[1] The plaintiffs also challenge certain conditions and restrictions in the Award which were designed to preserve portions of the pre-merger lists.

those expectations." Moreover, since the necessary conditions and restrictions on a straight DOH/LOS list would be very complex and unworkable, a ratio was preferable.

In addition, the Arbitrator noted the record evidence that Pan Am, at the time of the merger, was experiencing financial difficulties with more than 400 pilots on furlough, many of whom had been on furlough for more than five years. National, on the other hand, was a young domestic carrier with no furloughed pilots. Under these circumstances, he concluded that:

> [A] straight DOH list would place a large number of the furloughees who have not worked as Pan Am airmen for five years, and a substantial number with even longer periods since they flew as Pan Am airmen, ahead of large numbers of National airmen who brought active jobs to the merger, including many who had been flying for National for upwards to five years. I regard that as an inequitable result.

(Gill Opinion, at 14).

The flight-engineers' seniority list, however, was integrated completely by DOH/LOS. There, the Arbitrator agreed with FEIA's Pan Am Chapter that the ratio method was unnecessary because the National flight-engineers, not being pilots or pilot-qualified, lacked the same promotion expectations held by the National pilots.

The Arbitrator was aware of the Pan Am pilots' bitter opposition to a ratio, and applied the ratio only as a last resort, and to a limited portion of the list. He noted that ALPA merger guidelines (which, while not binding in this case because of the presence of FEIA, were given weight because most of the affected airmen were ALPA members) authorize such a departure if necessary to achieve an equitable integration. The Arbitrator summarized the guidelines as follows:

> I think it is fair to summarize by saying that these provisions call for giving consideration first to a

> DOH list, then (if "acceptable accommodation" of the equities is not accomplished by such a list) to look at an LOS list, then (if "satisfactory accommodation" of the equities is still not accomplished) to attempt to accommodate the remaining inequities through temporary restrictions or conditions, and finally (if a "satisfactory accommodation" of the inequities is still not accomplished) to try "deviation" from the DOH and LOS manner of constructing the list in order to reach a "fair and equitable solution." This "deviation" has often taken the form of ratio arrangement for all or part of the merged list.

Gill Opinion at 12. The Arbitrator concluded that "there *are* some 'substantial practical inequities' in unrestricted operation of straight length of service which . . . could not feasibly be cured in workable and readily administrable fashion by special protective provisions." The ratio that the Arbitrator adopted covers a much smaller portion of the list than the National pilots advocated. In rejecting the National pilots' contention that the ratio should extend farther down the list, the Arbitrator explained that the degree of disparity in length of service between Pan Am and National pilots increased farther down the list and thus, extending the ratio as the National pilots sought would, on balance, result in too great a disparity in length of service between Pan Am and National pilots who would be ratioed together at that point in the list. The Arbitrator also noted that even though those National pilots below the ratio portion would not reach their promotion expectancies until long after the Pan Am airmen on the list near them reached theirs, this inequity was offset by the fact that these National pilots were, on average, younger and thus had more time to reach their expectancies.

In addition to his use of the ratio, the Arbitrator imposed several conditions and restrictions designed to pre-

vent either group of airmen from achieving a "windfall" at the expense of the other, including provisions for cross-over bidding in the event of sale of certain equipment, furlough ratios, and the reservation of 747 slots on a 9 to 1 basis for Pan Am pilots after January 1986.

After issuance of the award on May 18, 1981, the merger representatives presented the award to the company and defended the award before the CAB as they had agreed to do in the four-party agreement. Pan Am, which had not been a party to the four-party agreement or to the proceedings before the Arbitrator, accepted the award in its entirety on June 26, 1981.

At the time of the adoption, Pan Am was aware that pre-merger Pan Am pilots as a group were older than pre-merger National pilots and that any integrated seniority system which disadvantaged pre-merger Pan Am pilots would at the same time disadvantage older pilots. Pan Am did not undertake a detailed cost analysis of the Award or consider the pension and training costs as factors in deciding whether to accept the Award.

While Pan Am did not post a final integrated pilot list until April, 1982, ten months after it adopted the Award, the acceptance of the Award permitted Pan Am to integrate into one system the two separate Pan Am and National systems of aircraft and crews without the prior written consent of ALPA.

I. *Summary Judgment*

Pan Am and the Unions have moved for summary judgment dismissing the claims against them in *Cook* and its companion case *Lewandowski*[2] relating to the portion

[2] The Second Circuit's affirmance of the dismissal of the Railway Labor Act claims in *Cook v. Pan Am World Airways, Inc.*, 771 F.2d 635, 646 (2d Cir. 1985), *cert. denied*, 106 S.Ct. 895 (1986), is dispositive of those claims in *Lewandowski*, which was filed after *Cook* was dismissed by the district court but which is essentially identical to *Cook*.

of the list in which the ratio was applied. The motions are based on § 4(f)(2) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(f)(2), which insulates employers and labor unions from liability under the ADEA with respect to a seniority system if the employers and unions observe the terms of a seniority system that is "bona fide" and "is not a subterfuge to evade the purposes" of ADEA.[3]

Fed.R.Civ.P. 56(c) provides that a court shall grant a motion for summary judgment if it determines that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Summary judgment may not be granted if the dispute about a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986); *see Celotex Corp v. Catrett*, 106 S.Ct. 2548, 2553 (1986).

> In considering the motion, the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party.

Knight v. United States Fire Ins. Co., No. 86-7294 (2d Cir. Oct. 22, 1986).

A court must also decide that any disputed issues are not material to the outcome of the litigation. *Id.* Furthermore, a party cannot defeat a motion for summary judgment by relying on "mere speculation or conjecture

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[3] For the purposes of this motion, the parties seem to assume that the system resulted in a discriminatory impact on older pilots. The evidence now before the court does not necessarily lead to that conclusion. While there is evidence that some older pilots' rights have been diluted with respect to a straight length of service or date of hire system, that standard of comparison is not necessarily the proper one.

as to the true nature of the facts," even where it is alleged that evidence to support a claim lies within the exclusive control of the defendants. *Id.*

Therefore, summary judgment is appropriate where the evidence favoring the nonmoving party is insufficient for a jury to return a verdict for that party. *Anderson*, 106 S.Ct. at 2511. This standard mirrors that for a directed verdict under Fed.R.Civ.P. 50(a), which instructs the trial judge to direct a verdict if but one reasonable conclusion as to the verdict can be drawn from the evidence before the jury. *Id.*

II. *Bona Fide Seniority System*

In order to grant Pan Am's motion for summary judgment,[4] this court must determine that a reasonable jury could only conclude, on the evidence presented, that the system devised by the Arbitrator and adopted and thereafter observed by Pan Am (1) is a "bona fide" seniority system, (2) which is not a "subterfuge to evade the purposes" of the ADEA. The Second Circuit, in reversing a prior dismissal of this case, *see Cook v. Pan American World Airways, Inc.*, 771 F.2d 635, 644 (2d Cir. 1985), *cert. denied*, 106 S.Ct. 895 (1986), adopted as the criterion for determining whether a seniority system is "bona fide" the standard set forth in the pertinent regulation issued under ADEA by the Equal Employment Opportunity Commission ("EEOC"). That regulation states:

> Though a seniority system may be qualified by such factors as merit, capacity, or ability, any bona fide seniority system must be based on length of service as the primary criterion for the equitable allocation of available employment opportunities and prerogatives among younger and older workers.

29 C.F.R. § 1625.8(a) (1986).

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[4] The defendant labor unions will be considered separately, *see infra*.

The Second Circuit's observation that this system "would appear to satisfy the test that length of service be the 'primary criterion,'" *Cook*, 771 F.2d at 644,[5] is substantiated by the more fully-developed record now before the court. The flight-engineers' list was based entirely on date of hire and length of service. The pilot list, as merged by the Arbitrator, was based on length of service at the top and bottom ends of the list—fully one-half of the pilot list. Although the "conditions and restrictions" set forth in the Award qualify the entire pilot list, those qualifications were designed to preserve, to some extent, some of the rights that pilots had under the pre-merger seniority ssytems, which were indisputably based on length of service.

The middle portion of the pilot list was compiled by integrating the two pre-merger lists, which were themselves based on length of service, at a ratio of approximately 3.25 Pan Am pilots for every one National pilot, a ratio consistent with the fact that Pan Am had about 3.25 as many active pilots as National.

Although the Arbitrator altered a straight LOS integration, he did so in order to preserve pre-merger expectations of the pilots for each airline. The integration by the Arbitrator of two bona fide seniority lists in a way reasonably designed to preserve pre-merger expectations is itself a bona fide seniority system.

III. *"Subterfuge"*

The EEOC regulation discussed above also states that:

> Adoption of a purported seniority system which gives those with longer service lesser rights, and results

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[5] Although the Second Circuit commented on this issue, the issue was not actually before the court. Thus, the Second Circuit opinion is not determinative of the outcome here.

> in discharge or less favored treatment to those within the protection of the Act, may, depending upon the circumstances, be a "subterfuge to evade the purposes" of the Act.

29 C.F.R. § 1625.8(b) (1986). The Supreme Court has observed that "subterfuge" in § 4(f)(2) must be given its "ordinary meaning," *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203 (1977):

> In ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem, or artifice of evasion.

Id. The Second Circuit similarly interprets this section to require discriminatory or evasive intent. Absent evidence that Pan Am or the Unions acted "in bad faith or with an age-discriminatory motive," the "mere fact that plaintiffs would have fared better under a different scheme" is insufficient to show that the system is a "subterfuge" under the ADEA. *See Cook*, 771 F.2d at 644; *see also Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc.*, 547 F. Supp. 1221, 1231-32 (S.D.N.Y. 1982) (disparate impact alone, without actual intent to discriminate, does not establish an ADEA prima facie case where a seniority system is involved), *aff'd in part and rev'd in part*, 713 F.2d 940 (2d Cir. 1983), *aff'd in part and rev'd in part sub nom. Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). Among the circumstances to be considered in determining whether or not Pan Am and the Unions acted in bad faith or with an age-discriminatory motive are the validity of the reasons Pan Am put forth for adopting the system and the Unions for agreeing to it, and the validity of Cook's claim that defendants engaged in "willful" discrimination. *Cook*, 771 F.2d at 644. Under *Cipriano v. Board of Educ.*, 785 F.2d 51, 58 (2d Cir. 1986), Pan Am and the Unions have the burden of demonstrating that the seniority system is not a "subterfuge."

While it is not an absolute requirement that Pan Am and the Unions demonstrate a business or economic purpose to justify a bona fide seniority system, *see United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203 (1977), a showing of a "legitimate business reason" for accepting the plan is sufficient to demonstrate that the plan is not a "subterfuge." *See Cipriano v. Board of Educ.*, 785 F.2d 51, 58 (2d Cir. 1986).

Pan Am's articulated purpose in adopting the Arbitrator's Award was its desire to integrate the airlines as quickly as possible with a system that was "operationally manageable." The record taken as a whole does not give the rational finder of fact a basis for concluding that this was not Pan Am's purpose, despite Cook's claims that the Award did not lead to immediate integration and that Pan Am could not have believed it would. What is important here is what Pan Am believed at the time of adoption of the system.

While it is true that the desire to expedite integration would justify the acceptance of any system, this is, nevertheless, a valid reason for adopting this system. The issue is not whether Pan Am had a good reason for adopting this system over some other possible system, but whether its purported reason is a pretext for discriminatory intent. *See Gray v. New England Tel and Tel. Co.*, 792 F.2d 251, 255 (1st Cir. 1986). The circumstances surrounding the adoption of the system demonstrate that Pan Am's justification is no pretext. The fact that the system is not facially discriminatory [6] and was a result of an arbitration whose main objective was to preserve pre-merger expectations in the equitable merger of two seniority lists evidences Pan Am's good faith in adopting the Award. The desire to "get on with its business" is a

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[6] While the Arbitrator's Award clearly diluted the pre-merger seniority rights of some Pan Am pilots, it was not facially obvious that the rights of older pilots were affected.

legitimate business reason for adopting the Award. While Pan Am could have refused to adopt the Award and submitted the issue to another arbitration, binding this time, there was no guaranty that the outcome would not similarly result in older pilots being lower on the list than younger pilots with equal seniority. While Cook alleges that the time actually needed to re-arbitrate the dispute with Pan Am as a party was much less than the time it took for Pan Am to implement the Award, no affirmative evidence has been presented to refute the deposition testimony that Pan Am in good faith made a management decision that adoption of the award would lead more quickly to an integrated system. *See Gray, supra*, 792 F.2d at 255 ("It is not enough . . . to show that the employer made an unwise business decision, or . . . acted arbitrarily or with ill will. These facts . . . do not necessarily show that *age* was a motivating factor").

While the burden of proof is on Pan Am and the Unions to show that the system is not a "subterfuge," *see Cipriano*, 785 F.2d at 58,[7] there is sufficient unrefuted evidence to take that question away from the jury. While it is, of course, difficult to prove lack of discriminatory intent, the fact that such intent is the issue here does not automatically preclude summary judgment. Although Pan Am was aware that Pan Am airmen as a group were older than National airmen and that the new system was not based solely on seniority, there is no direct evidence that Pan Am adopted the system in order to disadvantage older pilots for the benefit of younger

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[7] Where a seniority system is in issue, at least one court in this Circuit has suggested that plaintiffs must show discriminatory intent as part of their prima facie case. *See Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc.*, 547 F. Supp. 1221, 1231 (S.D.N.Y. 1982), *aff'd in part and rev'd in part*, 713 F.2d 940 (2d Cir. 1983), *aff'd in part and rev'd in part*, 469 U.S. 111 (1985). Under that standard, plaintiffs would bear the burden of making a showing sufficient to establish the existence of that essential element. *See Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2553 (1986).

pilots. The Arbitrator's lack of discriminatory intent is unquestioned. The eleven depositions taken by Cook support no inference that Pan Am based its decision on the age of the pilots involved.

The evidence on which Cook relies to support the claim of discriminatory intent consists of (1) an affidavit of Dr. Ira S. Chorush, a statistical consultant, which states that the system's impact on older pilots is great and that the probability that the decline in seniority for older pilots occurred by chance is less than one in a million.[8] (2) testimony that Pan Am knew that the Award would diminish the seniority rights of the older Pan Am pilots, and (3) the undisputed statement that Pan Am is a defendant in a separate age discrimination action in which Pan Am is charged with discriminating against pilots over 60 years old and in which a proposed settlement was overruled by the district court, given the likelihood of success on the merits. *See EEOC v. Pan American World Airways, Inc.*, 622 F. Supp. 633 (N.D.Cal. 1985), *appeal dismissed*, 796 F.2d 314 (9th Cir. 1986). In the face of Pan Am's showing, Cook's evidence is insufficient to support an inference of discriminatory intent.

Despite the undisputed evidence of legitimate business purpose and the lack of direct evidence of discriminatory intent, Cook asks this court to deny summary judgment on the ground that Pan Am's actions were a "subterfuge" because Pan Am adopted the pilot seniority in "reckless disregard" of whether its conduct discriminated against older workers. The evidence establishes that Pan Am did not make any study or survey concerning ADEA implications. Cook asks this court, in essence, to hold that

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[8] The probative value of this statement is questionable since, as ALPA points out in its reply memorandum of law, the decline in seniority for Pan Am pilots concededly did not occur by chance; it was the result of a conscious attempt to satisfy the pre-merger expectations of both National and Pan Am pilots.

Pan Am must make a good faith effort to learn and comply with the ADEA's requirements to obviate a finding of "reckless disregard" on these facts.

To date, no decision has equated reckless disregard with subterfuge. Cook seeks to achieve that link by using the Second Circuit's directive in the first appeal, *see Cook*, 771 F.2d at 644, that the validity of plaintiffs' claim that defendants engaged in "willful" discrimination is to be considered in connection with the subterfuge issue. Cook then cites *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), which held that a defendant "willfully" violates the ADEA, and thus is liable for double damages under § 626(b), if the plaintiff can meet the heightened level of proof that the defendant "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Id.* at 128 (citing *Air Line Pilots Ass'n, Int'l. v. Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2d Cir. 1983)).

Even if the Second Circuit intended by this single phrase to expand the defendant's burden of proof to require a showing that he did not willfully discriminate, the subsequent Second Circuit decision in *Cipriano*, 785 F.2d 51, indicates that this further showing is not necessary. As discussed *supra*, *Cipriano* holds that a showing of a "legitimate business reason" for accepting the plan is sufficient to demonstrate that the plan is not a "subterfuge." Since a legitimate business reason has been shown here, defendants do not have to go further and demonstrate a lack of willfulness. This conclusion is supported by the language of the Act itself.

Although Cook asks the court to require a defendant such as Pan Am to examine any prospective seniority system for a possibly negative impact on older workers, they do not suggest a standard against which the 'negative impact" is to be measured. The Second Circuit has stated explicitly that the "mere fact that plaintiffs would have fared better under a different scheme does not show

that the merged seniority list is a 'subterfuge' to evade the ADEA." *Cook*, 771 F.2d at 644. Presumably plaintiffs are requesting the court to hold that Pan Am must put older pilots in the same position or better than younger pilots with the same seniority, either as an absolute rule or absent a specific reason for elevating the particular younger individual over the older. In practical terms, this would require any large-scale arbitration award, resulting from a merger or otherwise, to observe strict seniority, despite legitimate reasons for deviating from strict seniority, such as preserving pre-merger expectations.

By outlawing plans that are a subterfuge to evade the Act's ban on discrimination on the basis of age, Congress did not intend to dictate the outcome of an arbitration free of discriminatory intent on the part of the arbitrator and the parties. It is enough that Pan Am and the Unions did not base their decisions to adopt and comply with the Award on the basis of the ages of the pilots. To decide otherwise would be to require arbitrators to always reach a decision on the basis of age, despite a clear mandate to the contrary. *See Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. Unit B 1981) ("ADEA mandates that an employer reach employment decisions without regard to age"), *cert. denied*, 455 U.S. 943 (1982).

Even if this court were to adopt the "willfulness" standard espoused by plaintiffs, summary judgment on this issue would, nevertheless, be appropriate. Pan Am concededly knew that the system created by the Award had a disproportionate impact on the seniority rights of Pan Am pilots, who were older as a group than the National pilots. Nevertheless, Pan Am was justified in relying on the arbitration process in which the age of the pilots was a major concern, and in relying on its own legitimate business reason for adopting the Award.

IV. *The Labor Unions*

Since the seniority system placed in effect was bona fide and not adopted by Pan Am as a "subterfuge to evade the purposes" of the Act, the Unions have not violated the Act by merely observing its terms. Nevertheless, Cook claims that the Unions have independently engaged in a subterfuge to evade the purposes of the ADEA.

Although the Unions have the burden of showing no subterfuge, *see Cipriano*, *supra*, 785 F.2d at 58, they have come forth with numerous affidavits, depositions and other evidence tending to show that there was no subterfuge. There is no evidence that their failure to challenge the Award was a stratagem or artifice to evade the requirements of the ADEA. *Carpenter v. Continental Trailways*, 635 F.2d 578, 581 (6th Cir. 1980), *cert. denied*, 451 U.S. 986 (1981). That lack of evidence, combined with the legitimate business purpose of creating a fair, equitable and workable seniority system by preserving pre-merger expectations, compels this court to grant summary judgment in favor of defendants.

For the foregoing reasons, the motions for summary judgment dismissing the ADEA claims are granted.

Judgment is to be submitted on notice.

IT IS SO ORDERED.

DATED: New York, N.Y.
November 6, 1986

/s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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84 Civ. 1651 (RWS)

JOHN C. COOK, *et al.*,
Plaintiffs,

—against—

PAN AMERICAN WORLD AIRWAYS, INC., AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AIR LINE PILOTS ASSOCIATION, PAN AM CHAPTER, FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, PAN AM CHAPTER,
Defendants.

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85 Civ. 2371 (RWS)

F.J. LEWANDOWSKI, *et al.*,
Plaintiffs,

—against—

PAN AMERICAN WORLD AIRWAYS, INC., AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AIR LINE PILOTS ASSOCIATION, PAN AM CHAPTER, FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, PAN AM CHAPTER,
Defendants.

JUDGMENT

A memorandum opinion and order of Honorable Robert W. Sweet, United States District Judge, dated November 6, 1986, heaving been filed on November 12,

1986, granting the defendants' motions for summary judgment, it is

ORDERED AND ADJUDGED that the plaintiffs take nothing of the defendants; that defendant's motions for summary judgment herein are granted; and that judgment is hereby entered dismissing these actions as against all named defendants; and it is further

ORDERED AND ADJUDGED that, defendants shall recover, costs

Dated: December 2, 1986
New York, New York

/s/ Robert W. Sweet
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 938—August Term, 1986

(Argued: April 6, 1987 Decided: May 8, 1987)

Docket No. 86-9033

JOHN C. COOK, *et al.*,

Appellants,

—v.—

PAN AMERICAN WORLD AIRWAYS, INC., AIR LINE PILOTS ASSOCIATION, INTERNATIONAL AIR LINE PILOTS ASSOCIATION, PAN AM CHAPTER; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, PAN AM CHAPTER,

Appellees.

F. J. LEWANDOWSKI, *et al.*,

Appellants,

—v.—

PAN AMERICAN WORLD AIRWAYS, INC., AIR LINE PILOTS ASSOCIATION, INTERNATIONAL AIR LINE PILOTS ASSOCIATION, PAN AM CHAPTER; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, PAN AM CHAPTER,

Appellees.

Before:

OAKES, KEARSE, and CARDAMONE,

Circuit Judges.

Appeal from the judgment of Robert W. Sweet, *Judge*, United States District Court for the Southern District of New York, granting appellees' motions for summary judgment on the ground that the challenged Pan American pilot seniority scheme was as a matter of law ex-

empt from the Age Discrimination in Employment Act, 29 U.S.C. § 623 *et seq.*

Affirmed.

Jeffrey C. Londa, Hutcheson & Grundy, Houston, TX (Robert E. Cohn, Kevin F. Flynn, Shaw, Pittman, Potts & Trowbridge, Washington, DC, Jeffrey M. Bernbach, New York, NY, of counsel), *for Appellants.*

Richard Schoolman, New York, NY (Patricia J. Langer, New York, NY, of counsel), *for Appellee American World Airways, Inc.*

Jonathan A. Cohen, Washington, DC (Gary Green, Washington, DC; Sidney Fox, Shapiro, Shiff, Beilly, Rosenberg & Fox, New York, NY, of counsel), *for Appellee Air Line Pilots Association.*

David B. Rosen, O'Donnell & Schwartz, New York, NY (Asher W. Schwartz, O'Donnell & Schwartz, New York, NY, of counsel), *for Appellees Flight Engineers International Association; Flight Engineers International Association, Pan Am Chapter.*

PER CURIAM:

The Judgment is affirmed on the opinion of Judge Sweet, 647 F. Supp. 816 (S.D.N.Y. 1986).

AFFIDAVIT

DISTRICT OF COLUMBIA) s.s.

BEFORE ME, the undersigned authority, on this day personally appeared Kevin Flynn, Esq., who under oath did state as follows:

1. My name is Kevin Flynn. I am over the age of twenty-one years and fully competent to make this affidavit.

2. I am an associate with the law firm of Shaw, Pittman, Potts & Trowbridge, 1800 M Street, N.W., Washington, D.C. 20036. I am a member of the District of Columbia Bar and have been admitted to the bar of this Court *pro hac vice*.

3. Exhibit A contains a chart bearing the little "Integrated Pilot Seniority List—Pan Am and National Airlines." This chart was prepared at my direction. The sole source for all information contained therein is the Gill Award, which is already part of the record of this case before this Court.

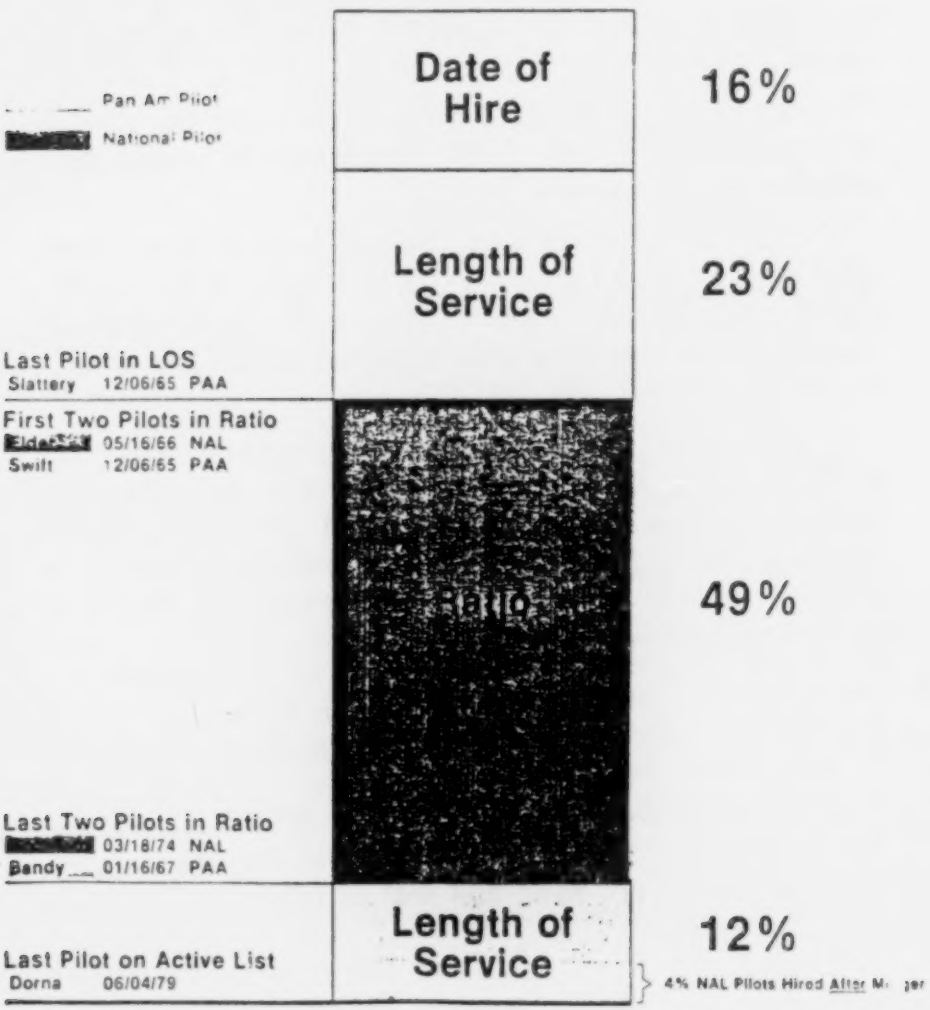
/s/ Kevin Flynn
KEVIN FLYNN

SUBSCRIBED AND SWORN TO BEFORE ME by the said Kevin Flynn on this the 6th day of August, 1986, to certify my hand and seal of office.

/s/ Margaret S. Kimbrough
Notary Public

My Commission Expires:
June 30, 1990

Integrated Pilot Seniority List
Pan Am and National Airlines



Source: Gill Award

BEST AVAILABLE COPY

No. 87-217

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN C. COOK, et al.,

and

F.J. LEWANDOWSKI, et al.,

Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC.; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; AIR LINE PILOTS ASSOCIATION, PAN AM CHAPTER; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, PAN AM CHAPTER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

RICHARD SCHOOLMAN, ESQ.
Pan Am Legal Dept.
200 Park Avenue, Rm. 918
New York, New York 10166
(212) 880-1121
Attorney for Respondent Pan American World Airways, Inc.

ASHER W. SCHWARTZ, ESQ.
O'DONNELL & SCHWARTZ
60 East 42nd Street
New York, New York 10165
(212) 370-5100
Attorney for Respondents Flight Engineers International Ass'n and Flight Engineers International Ass'n, Pan Am Chapter

GARY GREEN, ESQ.
JONATHAN A. COHEN, ESQ.
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 797-4110
Attorneys for Respondents Air Line Pilots Ass'n, International and Air Line Pilots Ass'n, Pan Am Chapter

QUESTION PRESENTED FOR REVIEW

Whether the District Court, as affirmed by the United States Court of Appeals for the Second Circuit, properly granted summary judgment dismissing petitioners' age discrimination claims on the grounds that the respondents' seniority system for pilots and flight engineers, generated by an arbitration award merging previously separate systems of separate airlines, and accepted by respondents, is a "bona fide seniority system" that "is not a subterfuge to evade the purposes of" the Age Discrimination in Employment Act within the meaning of the exemption set forth in Section 4(f)(2) of that Act.

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TABLE OF AUTHORITIES

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The Decision for which Review is Sought:

Cook v. Pan American World Airways, Inc., 645 F.Supp. 816 (S.D.N.Y.), *aff'd on the opinion below*, 817 F.2d 1030 (2d Cir. 1987) ..... *passim*

Previous Opinions in this Litigation:

Cook v. Pan American World Airways, Inc., 771 F.2d 635 (2d Cir. 1984), *cert. den.*, 106 S.Ct. 895 (1986) 3,4

Cook v. Pan American World Airways, Inc., 635 F.Supp. 693 (S.D.N.Y. 1986) 4

Other Cases:

California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980) 7,8

Matras v. Amoco Oil Co., 385 N.W.2d 586 (Sup. Ct. Mich. 1986) 11

Northeast Master Executive Council v. C.A.B., 506 F.2d 97 (D.C. Cir. 1974), *cert. den.*, 419 U.S. 1110 (1975) 8

Paolillo v. Dresser Industries, Inc., 821 F.2d 81 (2d Cir. June 16, 1987), *withdrawing and replacing* 813 F.2d 583 (2d Cir. 1987) 10

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Trans World Airlines v. Thurston, 469 U.S. 111 (1985) 11

United Airlines, Inc. v. McMann, 434 U.S. 192 (1977) 9

Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. 1981), *cert. den.*, 455 U.S. 943 (1982) . 10

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29 C.F.R. §1625.8(a) 7

46 Fed. Reg. 47725 (Sept. 29, 1981) 7

New York Executive Law, §296(3-a) 11

No. 87-217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN C. COOK, et al.,

and

F.J. LEWANDOWSKI, et al.,

Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC.; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; AIR LINE PILOTS ASSOCIATION, PAN AM CHAPTER; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, PAN AM CHAPTER,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Introduction

Respondents – who are petitioners' employer and the unions representing the petitioners at various stages in their careers – file this brief in opposition to the petition for a writ of certiorari in the above-captioned action. The decisions below, granting and affirming summary judgment in favor of the respondents (defendants below) on the grounds that the challenged pilots seniority system was a "bona fide seniority system...which is

not a subterfuge to evade the purposes of [the Age Discrimination in Employment Act, (ADEA)]," were clearly correct on the facts. Those decisions broke no new legal ground, departed from no decisions of this Court, and created no conflict among the Courts of Appeals. It is petitioners (plaintiffs below) who wish to break new legal ground by advancing arguments designed to nullify one of ADEA's essential provisions, §4(f)(2) (29 U.S.C. §623(f)(2)), and thereby rewrite to their liking a statute that does not now suit them. The petition should be denied.

I. COUNTER-STATEMENT OF THE CASE

A. *Procedural History*

While, as petitioners note, this lawsuit began in March of 1984, this matter has had a substantial prior history. Respondent Pan American World Airways, Inc. ("Pan Am") acquired National Airlines in 1980, a transaction that required, and got, the approval of the Civil Aeronautics Board ("CAB"). As a condition of the CAB's approval, Pan Am had to integrate, or merge, the seniority systems of National personnel with those of Pan Am personnel in a "fair and equitable" way. Pan Am and the unions representing the four cockpit crew groups of the two pre-merger carriers (*i.e.*, Pan Am pilots, Pan Am flight engineers, National pilots, National flight engineers) then agreed that the unions would retain an arbitrator to create, in a four-party (inter- and intra-union) arbitration, a merged seniority system for pilots and for flight engineers, which system Pan Am could accept or reject; Pan Am, if it rejected this inter-union arbitrator's system, would then, under the CAB's merger conditions, have to participate in a (second) arbitration whose results would be binding on Pan Am. The inter-union arbitrator, Lewis Gill, in early 1981 devised an integrated seniority system consisting of a single pilots list and a single flight engineers list. Gill's system was accepted without modification by Pan Am a few months later.

The CAB had retained jurisdiction to review any post-merger integrated seniority system to ensure that it was "fair and

equitable." Consistent with that jurisdiction, a large group of pre-merger Pan Am pilots – almost identical to the plaintiffs-petitioners in this litigation – applied to the CAB to set aside the Gill-designed integrated seniority system as not "fair and equitable" in that Mr. Gill's seniority list for pilots (but not his flight engineers list) was disadvantageous to many pre-merger Pan Am pilots, who had tended to be more experienced and older than pre-merger National pilots, because that system was, in part, (i) constructed on the basis of a "ratio"and (ii) had "conditions and restrictions" tending to preserve pre-merger job opportunities, which in some instances superseded actual numerical positions in the new pilots seniority list.

In a lengthy decision, the CAB determined that the Gill seniority system was, as a matter of law, "fair and equitable" (and that the unions' conduct in the achieving of that system did not violate their duty of fair representation). *See*, CAB Order 82-4-75 (April 15, 1982). No appeal from that Order was taken.

In 1983, the first lay-offs under the Gill seniority system occurred. Of the 102 individuals laid off, only three were pre-merger Pan Am pilots (and plaintiffs-petitioners); that 1983 lay-off, and related job assignments, are the first Pan Am actions under the Gill system complained of in the petitioners' complaints.

In this litigation, the district court on October 31, 1984 dismissed the *Cook* complaint in its entirety on the grounds that it was an impermissible collateral attack on the CAB order; the Second Circuit affirmed in part and reversed in part. *Cook v. Pan American World Airways, Inc.*, 771 F.2d 635 (2d Cir. 1984), *cert. den.*, 106 S. Ct. 895 (1986). The Second Circuit affirmed the dismissal of the claims that, in agreeing to urge Pan Am to accept the Gill award (which had been designed by the unions' chosen arbitrator), the unions had violated their duty of fair representation to the plaintiffs; the Court of Appeals concluded that those claims, which had been presented to the CAB and resolved in the unions' favor by that agency, involved a legal matter the CAB jurisdictionally could and did properly resolve, so that the claims constituted an impermissible collateral attack on a CAB order.

However, as to plaintiffs' ADEA claim – that the Gill award's use of a ratio method to create part of the integrated pilots seniority list and the use of "conditions and restrictions" modifying the workings of that integrated list had an adverse impact on pre-merger Pan Am pilots, most of whom were over 40 (and slightly older than most pre-merger National pilots), as compared to a non-ratio, pure date-of-hire system without conditions – the Second Circuit took the view that the CAB neither purported to take jurisdiction, nor took jurisdiction, over the plaintiffs' age discrimination claims and so plaintiffs could bring those claims in the district court. While refusing to foreclose the plaintiffs' right to a *de novo* judicial determination of their age claims, the Second Circuit stated that its holding was "not intended to imply that the claims have merit or that plaintiffs will have the right to reopen the integrated seniority lists . . ." (*id.*, 771 F.2d at 644). Rather, the Court held that "this case is governed by §4(f)(2) of the ADEA," which "insulates an employer or labor organization from ADEA liability for observing the terms of a 'bona fide seniority system . . . which is not a subterfuge to evade the purposes' of the ADEA" (*id.*)

After remand, the district court denied a motion to intervene as party defendants filed by the group of pre-merger *National* pilots (636 F.Supp. 693 [S.D.N.Y. 1986]). Then, after plaintiffs had taken a dozen depositions, including that of Arbitrator Gill, defendants filed motions for summary judgment on the grounds that the seniority system challenged by the plaintiffs was in fact a "bona fide seniority system...which is not a subterfuge to evade the purposes" of ADEA within the meaning of ADEA §4(f)(2), 29 U.S.C. §623(f)(2). That motion was granted by the District Court (in an opinion reported at 645 F.Supp. 816 [S.D.N.Y.1986]); the Second Circuit affirmed, upon the opinion of the District Court, at 817 F.2d 1030 (2d Cir. 1987).

B. *The Basic Facts*

Inexplicably, petitioners fail to describe the "ratio method" by which the middle portion of the pilots seniority list was integrated by Mr. Gill despite the fact that it is that ratio method which

is the focus of their litigation. Mr. Gill was dealing with two separate seniority systems of two previously unrelated airlines, both of which systems were based on date-of-hire. Mr. Gill, in his award and in the separate 59-page opinion explaining the reasoning behind the award, concluded that a fair and equitable post-acquisition seniority system required that the new pilots list be constructed by length of service or date-of-hire at the top and bottom; but in the middle portion of the pilots list Mr. Gill chose to utilize a mixed ratio method. That method essentially slotted into the list after every 3.25 Pan Am pilots (from the pre-merger Pan Am pilots date-of-hire list) one National pilot (from the pre-merger National date-of-hire list), consistent with the fact that before the merger Pan Am had about 3.25 times as many pilots as National.

Mr. Gill explained that a complete date-of-hire or length-of-service list would have imposed substantial inequities on many National pilots. Thus, a ratio was necessary to insure that the lists were merged in a fair and equitable manner, *i.e.*, that

> "the airmen on each airline be in a position to fill vacancies in positions for which they had reasonable expectations absent the merger, or positions reasonably comparable thereto or, at least, to achieve a fair balance in the extent to which they may fall short of those expectations."*

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* Gill Opinion, found in the Joint Appendix filed with the Court of Appeals (No. 86-9033), at A-99. The flight engineers seniority list, in contrast to the new pilots list, was integrated completely by date of hire and length of service. (Gill Award, Petitioners' Appendix at l2a-l3a.) The arbitrator explained that the ratio method was unnecessary there because the National flight engineers, not being pilots or pilot-qualified, lacked the same promotion expectations held by the National pilots (Gill Opinion, found in the Joint Appendix, at A-l32). The two new integrated seniority *lists* have functioned as a single *system* for all Pan Am and former-National airmen, both pilots and flight engineers, in accord with Arbitrator Gill's Award on "cross bidding" between the flight engineer and the pilot seats ("Conditions and Restrictions," Section C, "Cross Bidding," Petitioner's Appendix at 17a).

(Footnote Continued)

The integrated pilots list was also subject to various "conditions and restrictions," by which Mr. Gill intended to recognize certain pre-merger expectations of the two pilot groups based on their relative positions in separate date-of-hire seniority systems on two very different airlines. Those conditions and restrictions preserved to a great extent – and for many years – the *pre-merger flying assignments of Pan Am as well as National pilots*, which assignments had been the results of the pilots' pre-merger positions in their separate date-of-hire seniority systems.

II. THE PETITION SHOULD BE DENIED

A. *The Integrated Seniority System is Clearly "Bona Fide" Within the Meaning of §4(f)(2) of ADEA, and No Review of the Decisions Below is Called For.*

Petitioners argue that the Gill seniority system is not "bona fide" within the meaning of §4(f)(2) of ADEA because, they claim, that system – with respect to portions and aspects of the *pilots* list – is inconsistent with an EEOC regulation, 29 C.F.R. §1625.8(a). That regulation, which the Courts below in fact relied upon, states that, while

> "a seniority system may be qualified by such features as merit, capacity or ability, any bona fide seniority system must be based on length of service as the primary criterion for the equitable allocation of available employment opportunities and prerogatives among younger and older workers."

In promulgating that regulation, the EEOC said it was adopting this Court's view that every bona fide seniority system

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Gill's use of the ratio method for a part of the pilots list was also consistent with respondent ALPA's merger policy, which prefers integration by date of hire and length of service but allows resort to a ratio where necessary to avoid serious inequities. (Gill Opinion, found in the Joint Appendix, at A-87-90). Such ratios have been used in airline mergers both before and since enactment of the ADEA, by Mr. Gill and others, when necessary to protect reasonable pre-merger expectancies. *See, e.g., In the Matter of Arbitration: Flying Tiger Line and Seaboard World Airlines* (1981). (Found in the Joint Appendix at A-178.)

dispenses preferential treatment "on the basis of some measure of time served in employment." *See*, *California Brewers Ass'n v. Bryant*, 444 U.S. 598, 606 (1980), cited at 46 Fed. Reg. 47725 (September 29, 1981). This "some-measure-of-time-served" definition is a broad one, as this Court recognized in *Bryant* by noting that *legitimate* seniority systems may reflect "not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry [and] inevitably come in all sizes and shapes" and may thus " 'measure[] [seniority] in a number of ways' " (444 U.S. at 608).

The courts below were clearly correct, as a matter of logic and definition, when they determined that a seniority system created (in part) by the merging by a ratio method of two separate, legitimate seniority systems that had been based on a date-of-hire principle — so that an employee's relative measure of time served with a pre-merger airline is the basis for that individual's relative position in the merged-by-ratio portion of a post-merger integrated seniority list — is a seniority system based on some measure of time served in employment. And petitioners have no authority to the contrary. Similarly, the use of "conditions and restrictions" intended to carry forward for a number of years, for *both* pre-merger carriers' pilots, preferential job assignments based on pre-merger job assignments growing out of pilots' relative positions on date-of-hire seniority lists is also, by logic and definition, an aspect of a seniority system that is based on "some measure of time served in employment."

Petitioners nevertheless contend that Mr. Gill's use of a ratio in the middle of the pilots list, to avoid severe diminution of the reasonable expectancies of the National pilots, was *per se* invalid under the EEOC regulation. They would read the provision allowing seniority systems to "be qualified by such factors as merit, capacity or ability" (29 CFR §1625.8(a)) as prohibiting any other kind of variation from pure length of service or date of hire. There is no basis for reading the regulation so narrowly; use of the language "such factors as" certainly indicates that the listed factors are not meant to be exhaustive and that other non-age factors, such as reasonable expectancies *based on previous*

length-of-service seniority systems, would also be legitimate qualifiers of straight length of service.

There is no support for petitioners' interpretaton anywhere in the EEOC's regulation or the preamble to that regulation (46 Fed. Reg. 47725 *et seq.*), or in any case law. Moreover, it flies in the face of years of government-approved seniority integration in the airline industry using ratios designed to give effect to the pre-merger expectations of pilots and engineers. The courts, the CAB, numerous arbitrators, and the ALPA merger policy have long accepted the validity of ratios when necessary to preserve some pre-merger expectations and thereby achieve an equitable integration. *See, e.g., Northeast Master Executive Council v. C.A.B.*, 506 F.2d 97, 104-05 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975).

Thus, without the support of any authority, petitioners are arguing for a definition of "bona fide" that would effectively limit new seniority systems to strict date of hire or length of service arrangements, without regard to the specific characteristics of a particular business – here, a merger of two very different airlines – and would take away from employers and labor unions, and arbitrators, virtually all possibility of merging previously separate seniority systems in a creative way, even where (as here) the way chosen was precisely one designed to allocate job opportunities equitably. Petitioners' arguments, in short, would call for a rejection of the common understanding of seniority systems, and of the broad flexibility allowed in seniority systems contemplated by this Court in, for example, the *Bryant* decision (444 U.S. at 608).

B. *The Lower Courts Correctly Found that the Integrated Seniority System Is Not a "Subterfuge to Evade the Purposes" of ADEA Within the Meaning of Section 4(f)(2) of that Act, and No Review of the Decisions Below is Called For.*

Petitioners, having no evidence that the respondents intended to discriminate against them because of their age, in essence argue that ADEA's §4(f)(2)'s phrase, "subterfuge to evade the purposes

of the [ADEA]," should have a new meaning, or rather, should have no meaning at all. The Court of Appeals for the Second Circuit, and this Court, have repeatedly made it clear that

> "[a] subterfuge under the Act is, in its ordinary dictionary sense, 'a scheme, plan, stratagem or artifice of evasion' *United Airlines, Inc. v. McMann*, 434 U.S. 192, 203 . . . (1977). This requires some showing of intent . . ."

Potenze v. New York Shipping Ass'n, Inc., 804 F.2d 235, 238 (2d Cir. 1986), *cert. den.*, 107 S.Ct. 1955 (1987). Petitioners, however, have not contended that Arbitrator Gill intended in his award to discriminate against anyone on the basis of age, and they have not presented any *evidence* that the respondents had any such intentions in accepting his award.

Accordingly, petitioners base their argument on "impact," asserting that respondents were obliged to reject the Gill system because respondents knew or should have known that it was not as favorable to petitioners — pre-merger Pan Am pilots over 40 — as other theoretically possible systems. Petitioners miss the point. The "subterfuge" requirement calls for a showing of age discriminatory intent, and the impact on petitioners of one seniority system vis-a-vis other systems that might benefit them and, of course, disadvantage others who might be younger (here, specifically, some pre-merger National pilots) is legally irrelevant under §4(f)(2).

Petitioners also argue that the respondents' *reasons* for accepting Mr. Gill's award rendered summary judgment inappropriate. Pan Am accepted the award because Pan Am determined that the award created a workable seniority system, and Pan Am wanted to get on with its business by operating with one seniority system instead of two. The unions urged adoption of the Gill Award because they had agreed, in advance, to support an award by their chosen arbitrator and because the Gill Award satisfied the need for a fair, equitable, and workable seniority system that preserved reasonable pre-merger expectations based on separate airlines' pre-merger date-of-hire seniority systems. Petitioners may

think those reasons inadequate or unreasonable from what amounts to a business school professor's point of view. But the wisdom of respondents' decisions is of no consequence absent an indication, based on evidence, that those reasons were part of a "scheme, plan, strategem, or artifice of evasion" covering up an age discriminatory intention, and there is absolutely no evidence of any such thing.*

Petitioners also assert that summary judgment should not have been granted because they claim that respondents had an obligation to determine the impact of the Gill system on pilots over 40, as compared to some hypothetical other seniority systems, and – because other conceivable systems were more advantageous to them – to reject the Gill system and try to obtain one more advantageous (to the petitioners). Because the respondents did not do so, petitioners argue that respondents apparently acted in "reckless disregard" of petitioners' ADEA rights, thereby foreclosing summary judgment at this stage.

Petitioners, however, are very mistaken about their rights; they are not entitled to *preferential* treatment *because of* their age. *See, e.g., Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. den.*, 455 U.S. 943 (1982); *Rosengarten v. J. C. Penny Co., Inc.*, 605 F.Supp. 154, 157 (E.D.N.Y. 1985). Indeed, what petitioners apparently want is an age-conscious review process designed to disadvantage pilots under 40 *because* they were under 40, in violation of various State age discrimination statutes that prohibit discrimination on the basis of age against

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* Petitioners go on to suggest that respondents had an obligation to demonstrate a "clear cost justification" for their accepting the Gill system, relying on a Second Circuit decision in *Paolillo v. Dresser Industries, Inc.*, 813 F.2d 583 (1987). It suffices to say that this cost justification requirement has never been applied to seniority systems, as opposed to benefit plans, under Section 4(f)(2). Moreover, seven weeks before the instant petition was filed, the cited *Paolillo* decision was withdrawn by the Second Circuit and replaced with a decision that in no way could support a conclusion that respondents here would have to demonstrate any cost justification for accepting Mr. Gill's award. See, *Paolillo v. Dresser Industries, Inc.*, 821 F.2d 81, 82, n. 1 (June 16, 1987).

those 18 and older, such as New York's (N.Y. Executive Law, 296[3-a]). *Cf., Matras v. Amoco Oil Co.*, 385 N.W.2d 586 (Sup. Ct. Mich. 1986). ADEA, needless to say, does not call for such an approach.

Furthermore, there is no authority that applies a "reckless disregard" standard, which *may* be used to determine whether to award liquidated damages in an ADEA case *after* underlying liability has been established,* to the establishing of underlying ADEA liability where defendants allegedly fail to act in the age-conscious way petitioners espouse. Not only is there no such authority but there could not be any such authority because it would essentially nullify the effect of the "subterfuge" exemption of ADEA's §4(f)(2). As this Court has made clear, "subterfuge" requires intent, and absent intent — whether the absence of intent is "reckless," simply unthinking, or positively pure-of-heart — there could be no subterfuge as a matter of simple definition of a word that has been recorded in the English language for several hundred years.

*See, *Trans World Airlines v. Thurston*, 469 U.S. 111, 126 (1985).

III. CONCLUSION

For the reasons outlined above, the Petition for a Writ of Certiorari should be denied in all respects. The issues petitioners seek to raise have been exhaustively and carefully dealt with by the Court of Appeals for the Second Circuit (twice), as well as by the District Court for the Southern District of New York. Petitioners have pointed to nothing showing how those decisions depart from the decisions of any other circuit or of this Court. In fact, the decisions below, which were based on a thorough review of the law and on a great deal of discovery, properly granted summary judgment in respondents' favor by applying undisputed facts to what must be seen as principles of law and of statutory interpretation that cannot be reasonably disputed.

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Respectfully submitted,

RICHARD SCHOOLMAN
200 Park Avenue
New York, New York 10166

GARY A. GREEN
JONATHAN A. COHEN
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036

ASHER W. SCHWARTZ
60 East 42nd Street
New York, New York 10165